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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FEBRUARY TERM, A. D. 1957

13 I.A.<sup>2d</sup> 56

PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,  
vs.  
MICHAEL JANOSKI,  
Plaintiff in Error.

Writs of Error to the  
Circuit Court of Du-  
Page County.

EOVALDI, J.

Three indictments under case Nos. 56-292, 56-293 and 56-294 were returned in the Circuit Court of DuPage County against plaintiff in error charging him with reckless homicide. Pleas of not guilty were entered as to each indictment, jury was waived, and the defendant was tried before the court. Evidence was heard under the first indictment, and a stipulation was entered into that the evidence under the first indictment should be the evidence under the second and third indictments, and that the record under the first indictment should stand as the record under the second and third indictments. Defendant was found guilty. Under

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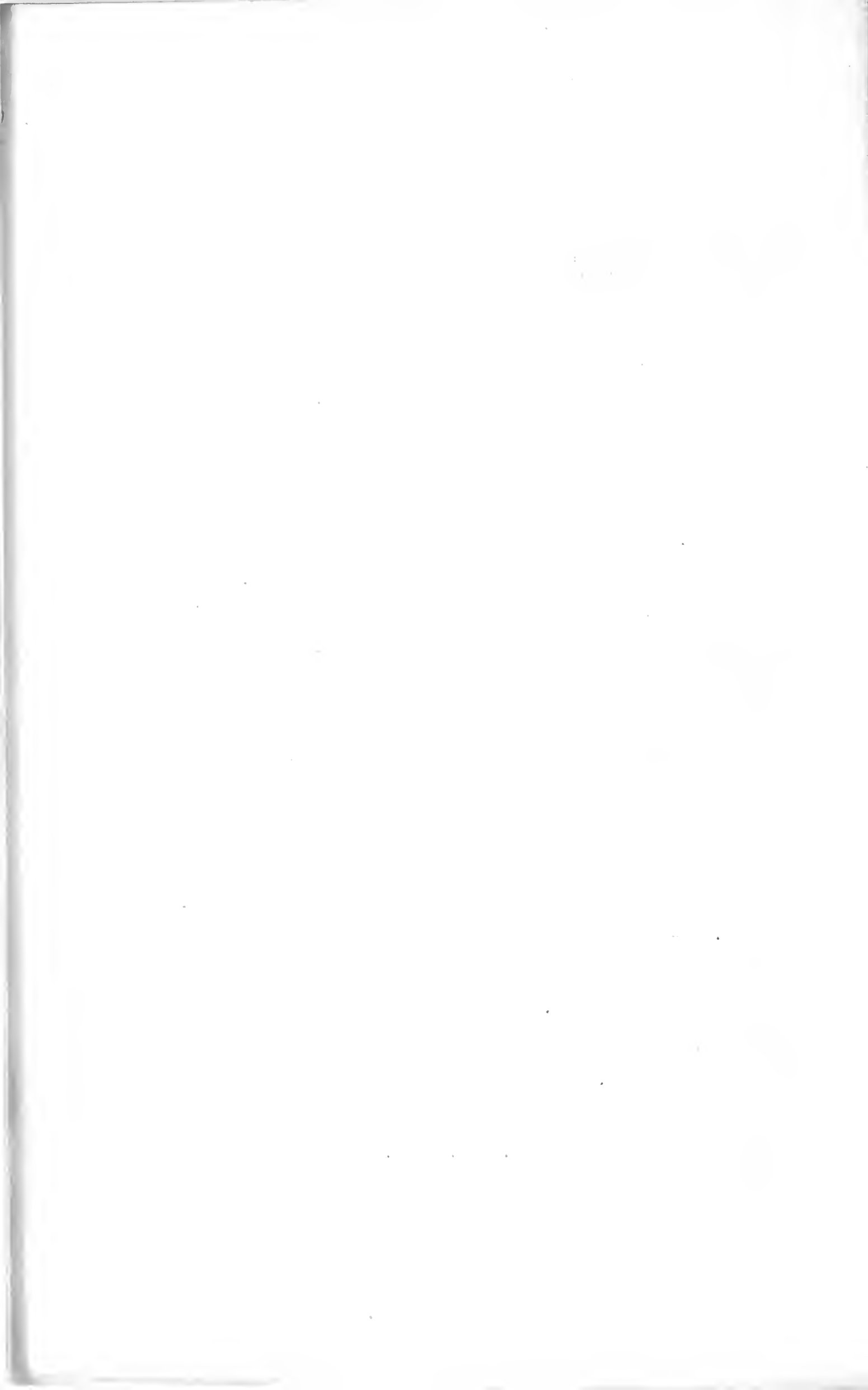
1. The first part of the paper is devoted to a general discussion of the problem.

2. In the second part, we shall consider the case of a single particle.

the first indictment, he was sentenced to the Illinois State Farm at Vandalia for a period of six months. Under the second indictment, he was sentenced to the same institution for a period of six months, the sentence to run consecutively with the sentence under the first indictment. Under the third indictment, he was sentenced to the Illinois State Farm at Vandalia for a period of six months but the sentence was to run concurrently with the sentence under the second indictment. By stipulation of counsel and by order of this court, the three cases were consolidated for review.

In the indictment in the first case the defendant was charged with driving a motor vehicle, to-wit, an automobile upon a public highway with reckless disregard for the safety of others, and with repeatedly bumping and colliding with the rear end of a certain motor vehicle to-wit, an automobile then and there being driven in a lawful manner by one Jack Fleetwood on said public highway, and in consequence thereof causing the death of Phyllis Sweitzer, a passenger in the Fleetwood automobile on the 26th of February, 1956. Case No. 56-293 charged the death of Muriel Fuller, another passenger in the Fleetwood automobile, under the same circumstances, and case No. 56-294 charged the death of Jack Fleetwood, the driver of the Fleetwood automobile, under the same circumstances.

The statute under which the three indictments were returned is Chapter 38, Ill. Rev. Stat., 1955, Paragraph 364 (a) which reads as follows:



"Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide. Any person convicted of reckless homicide shall be punished by a fine of not less than one hundred dollars (\$100) or more than one thousand dollars (\$1,000), or by imprisonment in the county jail for a determinate period of not less than sixty (60) days and not more than six (6) months, or by both such fine and such imprisonment, or by imprisonment in the penitentiary for an indeterminate period of not less than one (1) year or more than five (5) years."

The theory of the defendant is that there is no evidence whatsoever to sustain the conviction against him. Furthermore, in his reply brief, for the first time the defendant contended that there was no testimony in the record to show that anyone was killed, and therefore proof of the corpus delicti to sustain the allegations of the indictment was completely lacking. In their oral argument at the time the case was submitted to this court, the People pointed out that as defendant had not raised this point at the time of filing his brief, the People did not furnish an additional abstract. While we recognize, under Rules of Court, that new points raised for the first time by reply brief need not be considered, we have examined the record. The record refutes defendant's position on this point. A stipulation of facts was entered into at the trial. The stipulation was dictated into the record by the Assistant State's Attorney, William J. Bauer. In the stipulation





the parties agreed that

\*\*\* the matter arises out of an automobile collision with a bridge that occurred on the 26th day of February, 1956, an automobile driven by one Fleetwood, who is one of the decedents, and case No. 56-294 involves his death. There were two other passengers in the Fleetwood automobile also killed. One was Muriel Fuller, and the defendant is charged with reckless homicide in connection with her death in case No. 56-293. Miss Phyllis Sweitzer was also a passenger in that vehicle, and the defendant is charged in connection with her death under indictment 56-292, all three being reckless homicide charges. \*\*\*\*\*  
"The stipulation recites, I think, that the three were killed in that automobile.  
"Mr. VaSalle (defendant's attorney): That is correct.  
"Mr. Bauer: And that they died on the day of the accident, that is, the 26th day of February, 1956."

In view of defendant's contentions with reference to the sufficiency of the evidence to sustain the conviction it will be necessary to review the evidence.

On motion of defendant, the witnesses were excluded. Sandra Sweitzer, sister of the deceased Phyllis, testified that she was 15 years old and that she was at the party at the Al Fiest home on the evening in question and that Jack Fleetwood was going to drive Mary Vlasaty, Muriel Fuller, her sister, Al Fiest and witness home in his Ford convertible. She testified that the car driven by defendant was behind the Fleetwood car and that after they turned into Route 53 defendant kept bumping their bumper, "I don't know how many times the Janoski car bumped the Fleetwood car. When he first started bumping, I was turned



around and I could see him bumping \* \* \*. I saw another car, but I could not describe it. I have no idea of the rate of speed at which our car was driven when we passed the car. We passed the car and then Michael Janoski started bumping us again. He kept bumping us and we just went down that creek. The vehicle we were driving in struck a cement bridge, on the driver's side on the left hand side. I don't remember what happened when it struck the bridge. The next thing I remember is that I was lying there and I just crawled up." On cross examination the witness testified that she did not know how much time elapsed between the bump that defendant gave the Fleetwood car and the time the Fleetwood car started skidding. "Janoski bumped the Fleetwood car after we passed the other car." Witness admitted that at the Coroner's Inquest she was asked the following questions and gave the following answers:

"Q. Just prior to the time when the Fleetwood automobile went out of control, were you in the process of passing another vehicle?

"A. I guess we passed it. I can't remember.

"Q. Is that when the Fleetwood automobile went out of control?

"A. Yes, I think so, after we had passed that car and we were going for a little while.

"Q. Did he bump you at any time after you passed the other car?

"A. I'm not sure."

Witness further testified that she was not sure at this time whether defendant bumped Fleetwood after they passed the other



car.

Mary Vlasaty testified for the People that she was 18 years of age and that at about 6:30 on the evening in question she was at the home of Alan Fiest, remaining there until about 9:30 or 10:00 o'clock; that she left the Fiest home with Fleetwood, Muriel Fuller, Sandra Sweitzer, Phyllis Sweitzer and Al Fiest in Fleetwood's Ford convertible, "about '54 or '55, I don't know what year; I was sitting in the front seat, in the middle. On my left was Jack Fleetwood and on my right Sandra Sweitzer. The other three were in the back seat. \* \* \* I did not see the Janoski car until we turned on Route 53. I didn't pay any attention to it. That evening we were involved in an accident. We were going down Hobson--Route 53, I mean, and I don't know how far we went and eventually we skidded and I saw trees and that is all I remember. I don't think we passed any other vehicle before the accident."

Alan Fiest, 18, testified for the People that he had been at his home on the evening in question and that he rode in the Fleetwood automobile, a 1955 Ford convertible, with the persons previously identified, and that the Janoski car, a '55 Plymouth, two-door, sedan hard-top was following. "As we approached the intersection of Route 53 and Hobson Road, they tipped us once just before we got to the stop sign. I was sitting in the right rear of the Fleetwood car. I had occasion to look through the back window of that car.



I saw Mike Janoski's car behind us. I did not see him bump us, but I felt it. When we got to 53 we turned north. We proceeded north approximately a mile. The Janoski vehicle was following us. On Route 53 we passed another vehicle right by the Dolmyer farm. The Janoski vehicle was in back of us when we passed that other car. He followed us around the corner and bumped us once. Mike Janoski tipped us once right about the top of the hill there, and he followed us a little while longer and then tipped us again and then tipped us once more around the corner and she started flying. The first time he tipped us we were going about 55; the second time about 50 to 60; and the third time about 60 to 65. That was before we passed the other motor vehicle. After he passed the motor vehicle he was right in back of us when he passed us. He wasn't pushing us. He wasn't pushing us when we passed. We passed the other car and he slapped us after the pass. We struck the abutment of the bridge. The next thing I remember is, I woke up. I was lying half in the water and then I passed out again and woke up once in Bob Janoski's car and I woke up again at the hospital."

On cross examination the witness testified that the Fleetwood car began to skid about a half mile between the bridge and the Dolmyer farm and that he did not recall how far they went down the highway after they began to skid. "Gradually we got to the shoulder. When we reached the shoulder as we





skidded we were not too far from the bridge, about a quarter of a block or a half a block. \* \* \* When he started to skid the Miller car was in the right lane. I couldn't say how far back of the Fleetwood car. He passed him right by Dolmyer's. I couldn't say for sure how far he was. I would say 8 or 9 car lengths, that is the Miller car was 8 or 9 car lengths behind the Fleetwood car, when the Fleetwood car began to skid. The Janoski car was in back of us. He was in the left lane. When Fleetwood started to skid the Janoski car was about 10 or 15 or maybe 20 feet, I think back. Janoski last bumped Fleetwood about 10 car lengths before we passed the Miller car."

An independent eye witness--the only such witness not directly or indirectly involved in the incident--testified that he was a precision grinder, employed by Illinois Tool Works located at 2501 North Keeler Avenue, Chicago and that his address was Naperville, Route 2, Box 214 and that he lived in Plainfield, Illinois; that on the date of the accident he owned a 1952 Hudson and was travelling on Route 53 to Chicago where he had a sleeping room to save driving 60 miles a day in bad weather; the condition of the road was fair; it was clear, and the pavement was dry; after he passed the intersection of Hobson Road and Route 53, he did not see any other vehicle pass; he saw an accident about a mile and a half or two miles north of Hobson Road; that he was driving about 40 miles an hour, and had his radio playing. "All



of a sudden I heard a car behind me. I didn't know at the time whether it was one or two, but I heard a terrific roaring and all of a sudden two cars shot by me at least 70 miles an hour. They didn't seem any more than 5 or 6 feet apart, almost one on top of another. I started slowing down, and as these cars passed me, I would say they were at least 75 feet ahead of me when the second car caught up to the car that was in front and began pushing it. The car left the highway. The last I saw of it, it appeared to be turned completely over nose first, and the car that was doing the pushing just kept going north. So, I pulled off of the highway and I left my headlights burning and I started--at the time I didn't realize where I was at. I noticed in my headlights this bridge abutment there and I can't say for sure whether the car struck it or not before it disappeared, but I did see it when it started rolling over. \* \* \* When the cars passed me I was maybe 200 feet from the bridge. Well, I don't know. When the cars passed me they couldn't have been over 5 or 6 feet apart. Both of them went by me almost at the same time, one immediately behind the other. I was able to observe the first car, the 1953 Ford, as it pulled back into the right hand lane. I was able to see the Ford as it pulled back into the right hand lane. They were both in my headlights. I was able to see the second car as it pulled into the right hand

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lane. The cars were then still close together. After they passed me the rear car caught up to the front car. That is when the car, I think, was pushing the first one. That is when he went off the highway. I am afraid I couldn't say how far it was that he pushed him. It is hard to say how far he pushed him. The car that was doing the pushing was right behind him. The front end of the Ford vehicle left the road first. Route 53 is a two lane highway." The witness testified this was the first occasion he had to meet any of the people. On cross examination witness Miller testified that it was a quarter to nine, close to nine o'clock when he left home, and that it was about 6 or 7 miles from Plainfield to the scene of the accident, and that he must have driven about 15 or 20 minutes; and that he did not know what kind of a car the second car was. He admitted testifying at the Coroner's Inquest that the second car was a convertible and that that testimony was incorrect. The witness further testified "Both cars passed going about 70 miles an hour, and I was in the right lane. When they passed me, I was in the right lane going north, and they both passed me. They did not get right in front of me after they passed me but they did finally. Both were in that lane. We were actually, forgetting the distance, one behind the other. All the three cars, after they got lined up in that position, were to the right of the center line. When they passed me the second car caught up with the first car. They were right of the center

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line. Forgetting the distance we were one car behind the other. I saw the second car bump the first car. It happened right in front of me, they were right in my headlights. I could not see between the two cars. \* \* \* They both passed me at the same time, one right on top of the other. \* \* \* I can't say how far away I was from the bridge when they passed me. I didn't even know I was near a bridge, but they passed me and got into the lane in front of me. When I came back, I did not observe the highway leading to the bridge. I did not see any skid marks on the highway. I did not notice it. The skid mark appears to be to the right of the center line on People's Exhibit 2. I also see the skid mark in the photograph on People's Exhibit 1. The two cars travelled about 200 feet past me. All in all it took the two cars at least 100 feet before the first car started to skid. It seemed about that far. I would say they both were going about 70 miles per hour. I have no idea as to where they started to pass me. I didn't say it took 200 feet to pass me and get in front of me before the other car started to skid. I say approximately. I don't know. \* \* \* I saw the Fleetwood begin to skid. That car was ahead of the Janoski car. I was going about 40 miles an hour. \* \* \* From the time the cars started passing me until the Fleetwood car started to skid, I have no idea in seconds how much time elapsed. \* \* \* When the Fleetwood car went out of control, that car and the Janoski car were both approximately the





same distance ahead, about 50 feet. I was moving all the time."

John Devaney, a Deputy Sheriff of DuPage County, testified that he had occasion to go to the scene of the accident, receiving a call about 9:55, taking approximately 6 minutes to get there, so that it was near 10 o'clock; that his partner, Elmer Rosen, did most of the talking to the defendant and that he was present at part of the conversation; that he observed what appeared to be a skid mark which led directly to the abutment. Witness testified as to the statement of defendant as related in People's Exhibits 11, 12 and 13 which were later admitted in evidence over the objection of the defendant. On cross examination the witness testified that the statement was taken at about 3:30 on the morning of the 27th in the County Sheriff's office; that defendant was brought in by officer Rosen and by witness; that they went to defendant's home to pick him up approximately between 2 and 2:30 in the morning; that they brought him to the station and questioned him; that Janoski was there at home in bed and that he was aroused; his father was up. "I asked his father if I could have a word with him, and so he got up and went with us to the station. \* \* \* Janoski's conduct was very good. He was cooperative."

Elmer Rosen, a Deputy Sheriff of DuPage County, testified that he and Devaney had occasion to go to Route 53 near the intersection of Hobson Road, getting a call at 9:55



and arriving there shortly thereafter. He testified as to People's Exhibits 11, 12 and 13.

In People's Exhibits 11, 12 and 13 defendant stated that when the girls wanted to go home, they and Alan Fiest got in Jack Fleetwood's car, and that he was following Jack Fleetwood in his 1955 Plymouth, "driving about 50 M.P.H. I came up behind Jack Fleetwood's car and my front bumper hit his rear bumper. We arrived at Route 53 and turned north off Hobson Road. As we rounded the corner, my front bumper again hit his rear bumper. We were going about 25 M.P.H. The Fleetwood car picked up speed and pulled away from me. I was driving about 4 feet behind the Fleetwood car. At this point we were going about 70 M.P.H. My brother, Bob Janoski, yelled out that there was a car ahead of the Fleetwood car. I slowed up and the Fleetwood car passed the car ahead. As Fleetwood was passing this other car, he must have lost control and headed for the ditch. We then drove ahead, passing this other car. We did not see the Fleetwood car after we passed this other car. \* \* \* The last time I bumped the Fleetwood car was about one-half block before he crashed. The Fleetwood car had passed. I was alongside of the Miller car when the Fleetwood car hit the ditch. The distance between my car and the Fleetwood car was about 5 feet when he ran off the road. I was doing about 70 M.P.H. and passed the Miller car. I was about 5 feet behind the Fleetwood car just before he ran off the road. I think the



approximate speed of the Fleetwood car was 75 M.P.H. when he left the road. I was doing about 70 M.P.H. when the Fleetwood car left the road."

Michael Murray was called as a witness by the court and testified that on February 26, 1956 he met defendant for the first time; that he was in the Janoski car and that after they passed the intersection both cars went in the north direction; that after they got on Route 53 the Janoski car bumped the Fleetwood car; this taking place right after the turn; they were going about 25 or 30; that there was another bump after that about 100 or 150 feet up the road when they were going about 45. "From the time we got into Route 53 until the time that we got to the curve, there were 5 or 6 bumps. The last bump occurred before the curve, that is south of the curve. When the last bump occurred, the Fleetwood car was ahead of us. As we came to the curve I saw another automobile. That other automobile when I first saw it, was about 150 or 200 feet ahead of us. That other automobile was a 100 to 200 feet ahead of the Fleetwood car. When we first saw this third car we were going 65 to 70. We passed this third car, which eventually I found out was the Miller car. Both cars passed the Miller car probably right past the curve, that is right north. I saw the Fleetwood car slide. It occurred maybe a 100 or 125 feet from the bridge, when he started to skid. He was in the right lane, maybe a little off to the left. He was more in the right

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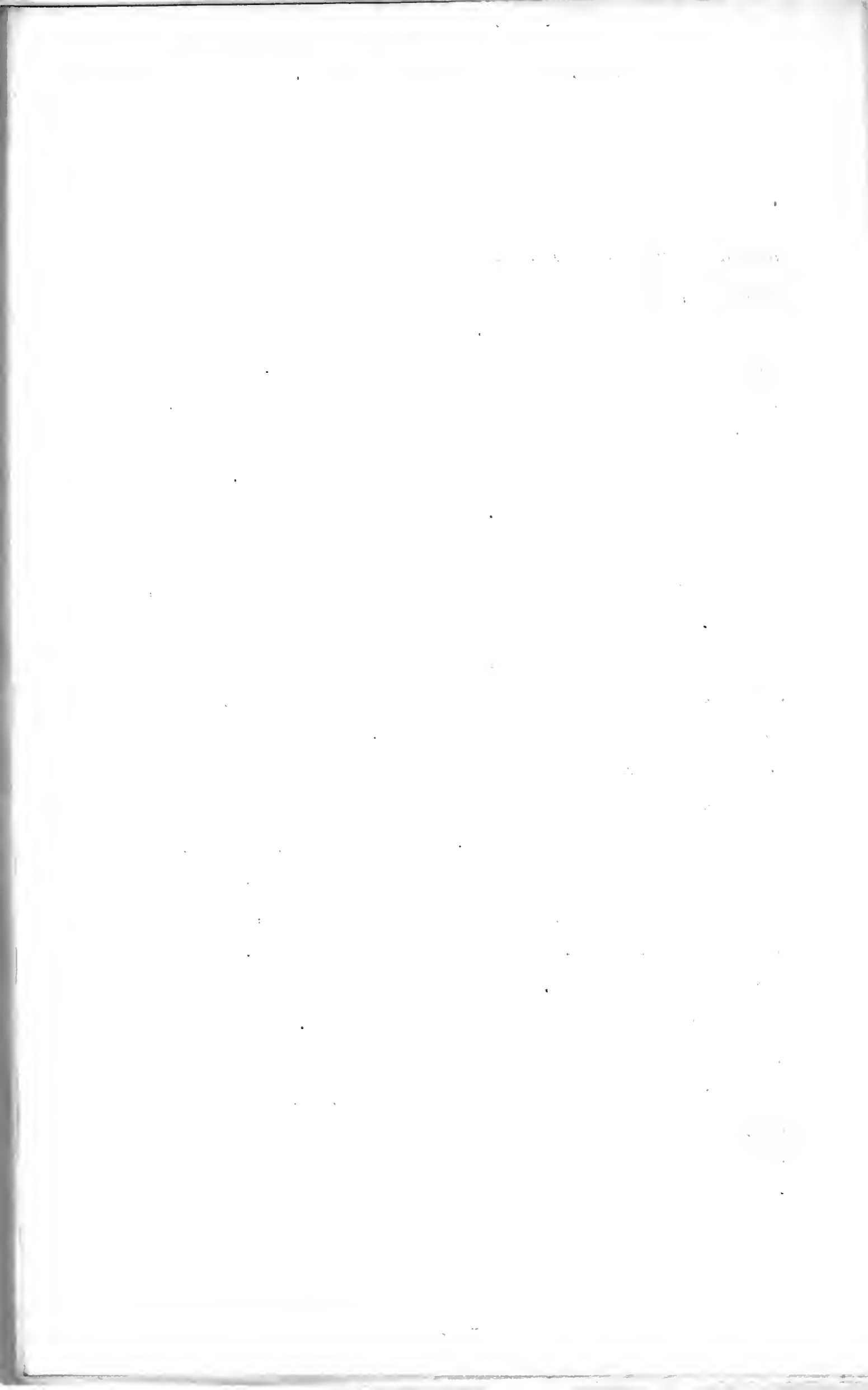
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when he started to skid. I think part of the car was in the left lane, because he just passed the other car and was pulling back in front of him. Before he got back in the right lane where you usually drive he started skidding. It looked to me that he was skidding as he was entering into that lane. He didn't straighten his car out when he started to skid. I was then sitting in the Janoski car behind Mike Janoski. We were following the Fleetwood car." On cross examination by the People, the witness testified "When the Fleetwood car struck the culvert it was facing toward the right side of the road, I think."

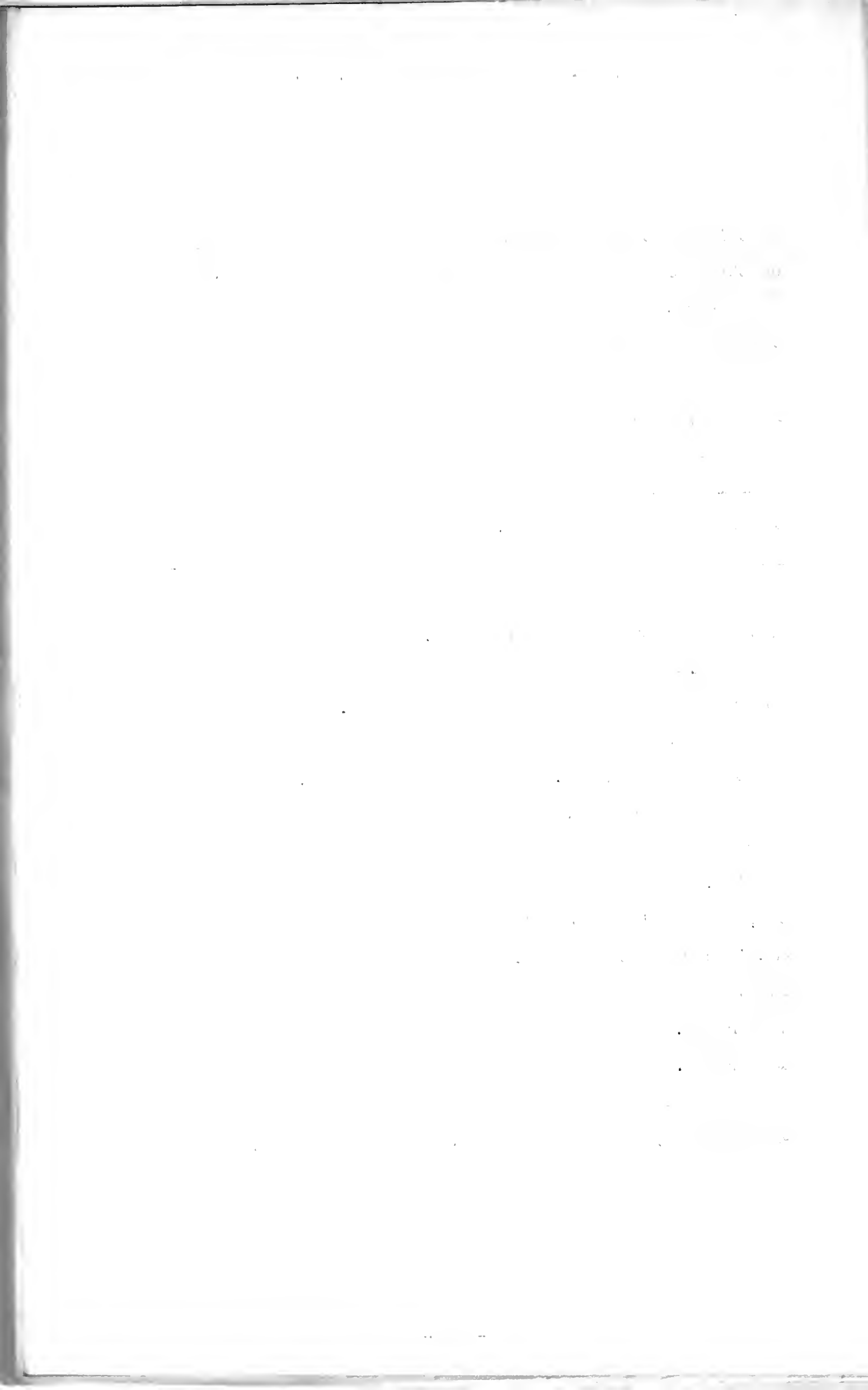
Without objection, the testimony of Bruce Scott which was taken at the Coroner's Inquest on March 15, 1956 at Naperville was read into the record. He testified that he had just turned left at the time of the accident and that they bumped Jack just before the stop sign; that he turned left on 53 "and we tapped him again. Then we tapped, I guess, one more time and started catching up with his car. There was a car up in front, and we were following Jack, and we tapped him once more. Bob Janoski said 'Slow down. There is a car in front of Jack.' So Jack passed out in front of this other car and that is the last time I saw him." He testified that at the party he drank about 5 bottles of beer and that he didn't know how many Mike Janoski drank, maybe 5 or 6; that in his opinion defendant was not intoxicated when he got into the car to drive it after the party; that he drove sanely;





that in his opinion defendant was not feeling the effect of the beer in any way; he wasn't staggering nor slurring his speech. He testified further that on the second occasion of the bumping the vehicles were going about 20 miles an hour; on the third bumping the vehicles were going about 30 or 35; he tapped him about 4 times; on the occasion of the last bump the vehicles were going about 55 or 60 miles an hour which was just prior to the Fleetwood car passing the vehicle in front of it. "I couldn't say exactly how far the vehicle was in front of the Fleetwood car. My estimate is about 3 or 4 car lengths, that is, Jack was 3 or 4 car lengths behind the other. After the last bumping the Fleetwood did not immediately thereafter begin to cross the center line in preparation for a pass. On further examination the witness testified "I knew all about this bumping that was going on. I could feel him bump. I didn't make any comment about it. The Fleetwood car was approximately 3 or 4 car lengths behind the third car following the last bumping. \* \* \* After we got around, after we passed that car, I couldn't see Jack's car on the road. I didn't see Jack's car start to slide. After we passed the car I happened to look over and there was dust coming over by the side of the bridge. Then Mike turned around and pulled up along by the bridge."

Defendant testified in his own behalf that he was 23 years old, was single and lived with his father, and that



he was a machine operator for Electro-Motive; that he cut wire on a machine; that he had been working since 1951; that he worked there in the office for about a year then went into service for 2 years; came back and worked there a couple of months and was planning on going back to school; that he was still working for Electro-Motive. He testified that at about 9:30 P.M. February 26 he was driving a '55 Belvidere sport coupe; his brother Bob was sitting beside him and Bruce Scott and Mike Murray were sitting in the rear; that he knew Jack Fleetwood casually maybe 3 or 4 years; Jack Fleetwood was driving in another car with 6 in the car, counting himself; "Just as we were coming to Route 53, Jack was slowing down. I hadn't been going too fast, and bumped him. We couldn't have been doing but about 20 or so. We were slowing down for the stop sign. Fleetwood travelled north on 53. I followed him and I bumped him again. He just rounded the bend of the intersection. I think he had his car in second gear and I had mine in second gear. He had just come around the corner at the intersection far enough to get two cars in. I was right behind him. He was 2 car lengths from Hobson Road on Route 53. I bumped him again. He was just starting out. He was only doing about 25 miles an hour. After I headed north on Route 53 I was in the right lane. I bumped him after that. It was just before the farm house on 53. I believe the Dolmyer farm house. \* \* \* The last bumping took place about 100 feet south of that. After the last bump I didn't see another



car, but my brother Bob noticed it and said 'Watch out, Mike, there is a car ahead.' So I slowed down and noticed it at that time. \* \* \* The third car which I eventually found out was the Miller car, when I first saw it I was around the curve leading to the Dolmyer farm. When I saw the Miller car, the Fleetwood car was still going ahead. He might have been a car length ahead of me at the time when I first saw him. The Miller car was about 200 or 250 feet ahead of me. Jack Fleetwood kept going straight down on Route 53 in the right lane. He started cutting out into the left lane to pass the Miller car and then went on around. When he did that, I was a couple of car lengths back of the Fleetwood car. The Fleetwood car got into the left lane. He passed the Miller car. They were alongside of one another. \* \* \* I was still a couple of car lengths behind the Fleetwood car, when they were abreast of each other. Fleetwood started cutting into the right lane. \* \* \* At that time my front end was alongside of Miller's middle. Fleetwood's car skidded. \* \* \* It started skidding in the left lane. When he started to skid I hadn't passed the Miller car. My front bumper was about the middle of Miller's car. From the point where Fleetwood started to skid to the bridge is 175 feet. From the point where he started to pass, or when he was abreast of the Miller car, to the bridge is about 230 feet. \* \* \* I would say that the Fleetwood car was doing at least 60 miles per hour when it passed in front of the Miller car. \* \* \* I bumped the



Fleetwood car before we got to the Dolmyer farm. That was the last time. When Fleetwood started to skid I was alongside the Miller car. In the process of going from the right lane to the left lane in order to get around the Miller car, I did not at any time get back into the right lane in front of the Miller car. \* \* \* I left about 11:30. I gave my name and address to the police officer and I went home. I again saw the police officers around 2 or 2:30 in the morning. I was in bed. They came to see me or to talk to me. They took me back to the station. I got to the police station about 3:00 o'clock. I was pretty nervous. My understanding of shock is the way you feel after something like this has happened, whether or not you are scared or calm. I believe I was under shock. They questioned me about what took place in the accident. I told them what occurred. They prepared a statement. The statement was written by Officer Devaney. When the officer got through preparing the statement he read it to me. I did not read it. He said I could read it, but I didn't read it. I signed it. In the statement which is People's Exhibit 13, there appears a sentence 'Last time I bumped the Fleetwood car was about half a block before he crashed.' I did not make that statement to the Police Officer. I told him 'about half a mile before he had crashed.' Other than that, the statement is correct. On cross examination defendant testified that he bumped the Fleetwood car 3 times; that he accelerated only once; that





he had bumped him before he became aware of the Miller car. "I was following him. I wasn't exactly chasing. I did not accelerate faster than he did to catch him. We were going about the same speed. We were right together when we left the intersection."

Defendant's brother Robert Janoski testified in his behalf that he was riding on the right side in the front seat in the Janoski car when defendant bumped Fleetwood at or near Hobson Road almost at the stop the first time; "We weren't going very fast. We just started out. As we proceeded down Route 53 we proceeded in the right lane. After this bumping there on 53, there was another bumping maybe a block or half a block away from Hobson Road. I know where the Dolmyer farm is situated. In relation to the Dolmyer farm the next bump was just south of the Dolmyer farm. It was maybe 100 feet south of the driveway. This was the last bumping. As we proceeded north behind the Fleetwood car I saw another car. It was in the right lane. It was maybe about a couple of hundred feet ahead of us when I first saw it. Just as I saw it I said we should slow down. Mike slowed down, applied his brakes. He kept on travelling on the right side of the road. The Fleetwood car kept travelling on the right side of the road. The Fleetwood car started to traverse from the right lane to the left lane. As he started to traverse we were a few car lengths behind. The Fleetwood car finally got into the left lane.

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It passed the Miller car. When it became abreast of the Miller car we were not in the left lane behind the Fleetwood car. We were about 30 feet back. The Fleetwood car crossed in front of the Miller car. When it started to cross we pulled out a little and we were getting alongside the Miller car in the left lane. Our front end was about by his door and I couldn't see the back end of the Fleetwood car then. After we had gone up ways we realized that Fleetwood was clear off the road. Miller's car blocked my vision and I couldn't see when Fleetwood's car went off. When the Fleetwood car started to cross from the left lane to the right lane, our front end was about the back of the door of Miller's car. It was a little ways after we passed the Miller car that I didn't see Jack Fleetwood's car. Then we saw some dust. He must have gone off the road already by then."

There is no dispute in the evidence that on more than one occasion defendant intentionally bumped the car of Fleetwood in the rear while both cars were travelling in the same direction; and that at no time did deceased Fleetwood bump into defendant's car. The only conflict in the evidence is as to the place in the road, and the position of the three cars thereon, when the last bumping of deceased's car was done by defendant. The one eye witness who was also travelling in the same direction in his car just as it was passed by the two other cars, testified that the automobile driven by the defendant was bumping or pushing the car driven by deceased



after the cars had passed him and had returned to the right side of the road, at a speed in the vicinity of seventy miles an hour, and that immediately following such bumping or pushing, the Fleetwood automobile left the road and crashed into a culvert. As a result of this collision three persons in the car which was bumped or pushed lost their lives. In *People v. Cullotta*, 376 Ill. 333, at 338 the court said:

"The trial judge had full opportunity to observe the witnesses while testifying and is in a better position to weigh their testimony than is a reviewing court. Where there is no jury, the law has committed to the court the determination of the credibility of the witnesses and the weight to be accorded their testimony. This court will not substitute its judgment for that of the trial court where the evidence is merely conflicting."

To the same effect is *People v. Martishuis*, 361 Ill. 178; *People v. Cohen*, 363 Ill. 303; *People v. Bolger*, 359 Ill. 58. The Supreme Court applied the same rule of law in the case of *People v. Ristau*, 363 Ill. 583 in affirming a cause tried before the court without a jury where the evidence was conflicting.

The trial judge saw and heard the witnesses who testified in this cause. He was convinced from the testimony as to the guilt of the defendant. We would not be warranted in substituting our judgment for that of the trial court under the facts as related in this case.

After a careful consideration of this record, we are unable to say that the evidence is insufficient to authorize the finding which the trial court made. Accordingly,

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the judgment of the circuit court of DuPage County is affirmed.

Judgment affirmed.

*Howe P.J. Concur.*

Crow, J. Concur

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STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

February Term, A. D. 1957

13 I.A.<sup>2d</sup> 56

General No. 10097

Agenda No. 14

Mary Elizabeth Brown,

Plaintiff-Appellant,

vs.

Norman Brown, Jr.,

Defendant-Appellee.

:  
:  
:  
: Appeal from  
: Circuit Court of  
: Macoupin County.  
:  
:  
:

CARROLL, J.

Under the terms of a divorce decree entered by the Circuit Court of Macoupin County on July 8, 1954, plaintiff was awarded custody of Linda Jane Brown and Norman Brown, minor children of the parties hereto. Subsequently, defendant petitioned the court to modify said decree by taking custody of the children from plaintiff and awarding same to him.

Neither the filing date nor the contents of defendant's petition are included in the record. However, the basis thereof is indicated by certain specific findings of fact recited in an order later entered by the court and which are as follows:

February Term, A. D. 1957

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Mary Elizabeth Brown.

[illegible]

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Norman Brown, Jr.

...[Jan 4-10 1937]

T. CARROLL

"The court further finds that after the entry of said decree, to-wit, on the 26th day of August, 1955, there was born to the said Mary Elizabeth Brown a female child; that said child was born out of wedlock and that the same is now being reared in the home of the said Mary Elizabeth Brown with the two (2) minor children of the parties hereto; namely, Linda Jane Brown and Norman Brown; that said Mary Elizabeth Brown has been guilty of immoral conduct and has not demeaned herself as a loving and faithful mother; that the conduct of the said Mary Elizabeth Brown in becoming the mother of an illegitimate child and of rearing said child in the same home with the two (2) minor children, Linda Jane Brown and Norman Brown, is injurious and detrimental to the best interests and welfare of said minor children, and that the said Mary Elizabeth Brown, because of her conduct is no longer a fit and proper person to have the care, custody, control and education of said minor children."

On February 2, 1956, after a full hearing of defendant's petition, the court made the above findings and awarded custody of the children to defendant, subject to plaintiff's right of reasonable visitation.

From this order plaintiff appeals, her theory being that the evidence shows her to be a fit and proper person to have the custody of the children and for their best interest they should remain in her custody, and that the evidence fails to show such a change in conditions since the entry of the decree as to require its modification.

The birth of the illegitimate child and its presence in her home are admitted. The record discloses the facts surrounding plaintiff's indiscretion which resulted in the birth of a child out of wedlock to be that after her divorce she fell in love



with a man who promised to marry her; that he purchased and showed her a wedding ring; that plans for her marriage were made in the Fall of 1954; that in early January of 1955 he and plaintiff left Gillespie, Illinois where she lived to go to DuQuoin to be married; that due to an automobile accident the wedding was postponed; and in March 1955 because of an objection by his mother and a waning of affection, he refused to marry plaintiff although knowing she was pregnant as the result of relations with him. There is no evidence of any other misconduct on the part of plaintiff.

The home in which the children live is in Gillespie and that the same is comfortable and adequate for their needs does not appear to be questioned. From the record it also appears abundantly clear that plaintiff is fully meeting her maternal obligation to properly feed and clothe the children. Likewise, their religious and educational needs are not being neglected. Both have been baptized and attend church and Linda, the older child, attends parochial school regularly.

Since the Chancellor made no findings to the contrary, it may be assumed the evidence supports the conclusion that the children are receiving proper care.

The defendant has remarried and lives in Cicero, Illinois. He testified that he and his wife live in an apartment consisting of a bedroom, living room, kitchen and bath but that if custody of the children is awarded to him, he will obtain larger living quarters. During the  $1\frac{1}{2}$  years since the divorce, the defendant,

with a man who promised to marry her; that he was married  
to her a wedding ring; that when he was in the  
fall of 1934; that in early January, 1935 he was in  
Gillespie, Illinois; that he was in the  
that due to an accident he was in  
in March 1935; that he was in  
of accident, he was in  
was present at the time of the  
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according to his own testimony, has exercised his right to visit the children on only 7 occasions. However, plaintiff insists the visits were less in number.

Under Section 18 of the Divorce Act (Chap. 40, Par. 19, Ill. Rev. Statutes 1955), the trial court is clothed with a wide discretion in determining questions pertaining to the custody of children. Buehler v. Buehler, 305 Ill. App. 609.

The basic question presented by this appeal is whether the court abused such discretion in modifying the original decree by awarding custody of the children to defendant. A divorce decree fixing custody of children constitutes a final adjudication on the conditions existing at the time of its entry and should not otherwise be modified unless new conditions are shown to have arisen. Stafford v. Stafford, 299 Ill. 438; Nye v. Nye, 411 Ill. 408. However, the above general rule is not interpreted to mean that the mere fact that there has been a change in conditions is sufficient in itself to warrant modification of the custody provisions. It is only where the welfare of the child or children is affected by such changed conditions that the existence thereof warrants the court in changing its prior custody order. Maupin v. Maupin, 339 Ill. App. 484; Wade v. Wade, 345 Ill. App. 170; Thomas v. Thomas, 233 Ill. App. 488.

It is a well established rule that in a situation such as is presented by this case, the welfare of the children is preeminently the thing to be considered. Martinec v. Sharapata,





328 Ill. App. 339; Wade v. Wade, supra. Of equal importance is the rule indicated by many decisions of the courts that other things being equal, the mother will ordinarily be awarded the custody of children of tender years. Fontaine v. Fontaine, 9 Ill. App. 2d 482; Nye v. Nye, supra; Buehler v. Buehler, supra. Little argument is needed in support of such rule, since it must be recognized that in the life of a child of tender years, no factor conducive to its happiness and contentment outweighs the love and affection of its mother.

Plaintiff argues in support of her position that the evidence shows her to be a fit mother, giving proper care and guidance to the children; and that her prior misconduct resulting in the birth of an illegitimate child in the absence of evidence indicating further misconduct on her part, affords an insufficient basis for the trial court's action. It is further contended that since the children are of tender years, their custody should remain with plaintiff and that depriving her of their custody would amount to punishing both her and the children for her past misconduct.

Relied upon principally by plaintiff as sustaining her argument is the case of Nye v. Nye, supra. In that case, the plaintiff was awarded custody of the minor child of the parties by a divorce decree entered December 21, 1948. On the morning of February 25, 1949, the defendant entered the home in which the



plaintiff and the child were living and discovered plaintiff engaged in improper conduct with Herbert Bruckern, who was not then her husband but to whom she was married that afternoon and with whom she was living at the time of the hearing on the custody question. On petition of defendant, the Chancellor found that the circumstances of the parties had materially changed since the divorce decree and that custody should be changed in the best interests of the child. The Appellate Court reversed the Chancellor's ruling and on appeal to the Supreme Court its judgment was affirmed. The Supreme Court in pointing out the reasons for holding the modification order of the Chancellor to be an abuse of discretion, had this to say:

"Where the mother is able to care for her minor daughter and is not shown to lack the proper attributes of good motherhood, past misconduct, where the evidence indicates no probable future misconduct, should not be a basis for denying custody to the mother. To do so would be not only to punish the mother for her past misconduct, but, more important, would punish the child by denying her a mother's care and guidance. It is not the purpose of this court, nor of any court, to so punish an innocent child. The guiding star is and must be, at all times, the best interest of the child. Other than the alleged prior misconduct on the wife's part here, she is shown to be an affectionate, dutiful mother, giving proper care and guidance to her child. She is married to the only man with whom she allegedly was indiscreet. She has a good home and is respected in her community. She has never been absolutely proved to be an adultress, nor was any of the alleged misconduct absolutely proved."

In the instant case, the sole basis of the order modifying the decree is the finding that plaintiff gave birth to an



illegitimate child which is being reared with the children of the parties. No evidence indicating probable future misconduct on the part of plaintiff appears in the record. On the other hand, there is abundant proof therein that she is not lacking in affection for her children and that they are receiving proper care. The Chancellor made no finding to the contrary but concluded that because of her past misconduct she was no longer a fit person to have the custody of the children.

We think the significant point made clear in the Nye case is that in determining what is best for children whose custody is the subject of judicial inquiry, the court must not base its conclusion upon one single consideration to the exclusion of all other factors bearing upon their welfare. As the court in that case observed, by so doing, the result accomplished is the inflicting of punishment on both mother and children. This would be foreign to the true purpose sought to be achieved by courts seeking to find a solution for questions dealing with the custody of children.

Admittedly, this record shows important considerations related to the welfare of the children aside from the misconduct of their mother. At the time of the hearing, Linda was 6 years of age and Norman was 4 years old and they are being cared for by their mother in a home adequate to their needs. If the defendant is awarded their custody it will mean taking them from such home where they are receiving proper care at the hands of an affectionate

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mother and placing them in a new environment to be cared for by a person who to them is a stranger. These considerations are of such importance that disregard thereof can result only in a decision falling short of that required under the circumstances.

Upon a careful review of the record, we are satisfied that the Chancellor erred in holding as a matter of law that plaintiff, because of her past misconduct alone, was not fit to have the custody of the children.

For the reasons indicated herein, the judgment of the Circuit Court is reversed.

Reversed.

Another and different view of the same subject is  
presented in the following table. It is a summary  
of the results of the experiments conducted at the  
University of California, Berkeley, during the  
summer of 1907. The table is divided into two  
parts, the first showing the results of the  
experiments conducted at the University of  
California, Berkeley, and the second showing  
the results of the experiments conducted at the  
University of California, Berkeley, during the  
summer of 1907.



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In the

APPELLATE COURT OF ILLINOIS

Fourth District

Term No. 57 F 14

Agenda 10

JANICE BOKER,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	City Court of
vs.	)	Alton, Madison
	)	County, Illinois,
HOWARD BOKER,	)	
	)	
Defendant-Appellant,	)	

13 LA 2d 57

Per Curiam

This is an appeal by defendant from an order denying his motion for judgment on the pleadings.

For a judgment or decree to be final and appealable, it must dispose of the subject matter and leave nothing to be done but to enforce by execution what has been determined. 2 Am. Jur. Appeal and Error, Sec. 22.

The denial of defendant's motion did not finally adjudicate the issues nor award plaintiff any of the relief prayed, but left the case ready for trial on the merits. This is not an appealable order and the appeal must be dismissed.

Appeal Dismissed.

Publish Abstract only.

FILED

1957-1957

James R. McLaughlin

CLERK OF THE APPELLATE COURT



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MOTOR BUILDING CORPORATION,  
an Illinois corporation,  
Appellee,

v.

FREDERICK C. BIGHAM, as  
Trustee under Trust No. 1,  
Appellant.

)  
)  
) APPEAL FROM SUPERIOR  
)  
) COURT, COOK COUNTY.  
)

13 I.A.<sup>2d</sup> 130

MR. PRESIDING JUSTICE ROBSON DELIVERED THE OPINION  
OF THE COURT.

This is an action by plaintiff, Motor Building Corporation, to rescind and cancel a lease and to restrain defendant, Frederick C. Bigham, as trustee, from enforcing the lease. The complaint consisted of three counts, one of which was in equity and is involved in the instant appeal. This was referred to a master who rendered a report in favor of plaintiff. Objections were filed to the report which were overruled by the master and allowed to stand as exceptions. The chancellor, after a hearing, entered a decree sustaining the master's report. The decree ordered the lease be rescinded and cancelled and, among other things, directed the defendant to return the sum of \$2,000 paid by plaintiff to the defendant as a deposit on the lease. Defendant appeals.

This appeal presents only one question. Where a tenant makes repeated demands on his landlord to comply with a covenant in the lease, requiring the landlord to make any and all repairs to the roof of the premises, and the landlord fails for almost a year to make the requested repairs, is the tenant justified in abandoning

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the  $\beta$  phase of the polymer. The  $\beta$  phase is the more ordered phase and is characterized by a higher density and a higher melting point than the  $\alpha$  phase. The  $\beta$  phase is also the more stable phase and is the one that is most commonly observed in nature. The  $\alpha$  phase is the less ordered phase and is characterized by a lower density and a lower melting point than the  $\beta$  phase. The  $\alpha$  phase is also the less stable phase and is the one that is most commonly observed in nature.

100-443887-1000

the premises and rescinding the lease?

The law in this State is well settled that when a landlord fails in his duty to a tenant and thereby deprives the tenant of the beneficial enjoyment of the leased premises, the tenant is justified in abandoning the premises before the expiration of the lease. Giddings v. Williams, 336 Ill. 482 (1929); Gibbons v. Hoefeld, 299 Ill. 455 (1921); Lawler v. McNamara, 203 Ill. App. 285 (1917); Sloss v. Brockman, 171 Ill. App. 465 (1912).

It is clear from these cases that the issue we must consider is one of fact. The record reveals that plaintiff leased certain premises for a term commencing February 1, 1951, and expiring January 31, 1953, at a monthly rental of \$800 and including a deposit of \$2,000 to cover the last two and one-half months of the rental period. The lease contained the following covenant:

"Upon receipt of written request from lessee, the lessor shall, during the term of this lease, make any and all repairs to the roof and exterior walls of the premises demised herein, and, when necessary, paint the exterior of the window and door sashes, except in case of damage thereto caused by any act or neglect of the lessee."

Plaintiff used the building for painting, fender and body repair work and for conditioning new automobiles. Richard Hoskins, a witness for plaintiff, testified that in March or April of 1951 the leaks developed in the roof. He attempted to contact defendant but was unable to do so. In September the leaks had grown much worse and he called in the Nelson Roofing Company to determine what could be



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done to stop the leaks and the cost of it. He again attempted to contact defendant to inform him of the situation but was not successful. In September of 1951 he turned the matter over to his attorneys. The leaky roof had forced plaintiff to move the polishing rack. It interfered extensively with the painting and repair of cars. During the period from September of 1951 to the date that the premises were vacated no one on behalf of defendant inspected or visited the premises to see about repairing the roof.

On November 28, 1951, plaintiff's attorneys, by letter, notified Mrs. Rose Bigham, as landlord and authorized representative of defendant, of defective conditions in the boiler and the roof. The letter contained estimates on the cost of repairing these defects and called upon the landlord to undertake these repairs. No response was made to this letter. On January 31, 1952, the tenant's attorneys sent another letter to Rose Bigham. The letter called attention to the earlier communication, recited that the lessee had expended money for repairs to the boiler, related a failure in the sewer system, and called upon the landlord to take immediate action in defraying the expenses incurred in remedying the defects described. The letter further stated that the tenant could not continue to occupy the premises under the existing conditions and advised the landlord that unless immediate action was taken, the tenant would institute proceedings to cancel the lease.

On February 7, 1952, the landlord's attorneys





notified the tenant by letter that the matter was under investigation and that the landlord would "take care of whatever items we deem are our responsibility in connection with the above building." The tenant requested an exact statement of the repairs to be undertaken by the landlord in a letter dated February 20, 1952. The landlord's attorneys replied by letter on February 22, 1952, assuming responsibility only for repairs to the roof.

William Nelson of the Nelson Roofing Company examined the roof in September, 1951, in March, 1952, and again on October 1, 1952. On his first two examinations he recommended a new roof to correct leaks in the old. On his third examination he found that the timbers supporting the roof were rotting. He informed plaintiff of this condition. Nelson testified that after the third examination he sent a letter to Mrs. Bigham recommending a new roof, and that, at about the same time, he informed her orally that a contractor should check the beams before any roofing work was done.

Prior to Nelson's third examination of the roof, plaintiff, by a letter dated September 26, 1952, informed the landlord that it was exercising its option to renew the lease for an additional three-year period, but that this renewal was to be conditioned on the landlord's repairing the roof, a beam supporting the roof, the gutters, the sewer, and the boiler. On October 9, 1952, after Nelson's third examination, the tenant, by letter, withdrew the offer to

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renew for failure to make the repairs requested on September 26 and informed the landlord that it would yield possession of the premises before the end of October, 1952, requesting further that the landlord refund the \$2,000 deposit. The tenant vacated the premises on October 31, 1952. Finally, in December the landlord replaced two trusses and repaired the roof.

Anthony Huberty, testifying on behalf of plaintiff, said that he had been in the construction business for 46 years; that he had inspected the premises involved; that the rotting of the trusses had been caused by the leaky roof; that because of this condition the roof could have caved in at any time.

The testimony of defendant's witnesses reveals no justification for the failure to repair the roof. Defendant attempts to argue that the leaky roof is separate and distinct from the rotting of the trusses. He contends plaintiff waived its right to abandon the premises for the leakage in the roof by its continued occupancy and that it failed to give him sufficient time to repair the rotten trusses.

It is clear from the record that the reason for plaintiff's vacating the premises was the leaky roof, which in turn rotted the trusses. This was a single continuing cause. It was properly treated as such by the master and by the chancellor. The cases cited by defendant lend no particular support to his theory. As an example, defendant



in his argument stresses the case of Automobile Supply Co. v. The Scene-In-Action Corp., 340 Ill. 196 (1930). There the landlord failed to heat the premises during the winter months. The tenant abandoned for this cause on April 30. The record indicated that April 9 was the last cold day on which the tenant had been denied the beneficial enjoyment of the premises. The court held that abandonment of the premises three weeks after the last failure mentioned to furnish heat was not reasonable, although an earlier abandonment, during the winter, would presumably have been justified. The facts of the instant case are in no way comparable, but indicate, instead, continuing material defects in the roof, which were aggravated, not improved, by the passage of time.

The master who heard and saw the witnesses found that the hazardous condition created by the rotting trusses, together with the leakage which had interfered with the operation of plaintiff's business, operated to deprive it of the beneficial enjoyment of the leased premises. The chancellor sustained the findings of the master. We are of the opinion from our examination of the record that the decree was proper.

Decree affirmed.

Schwartz and McCormick, JJ., concur.

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) under the conditions (2). It is shown that the system (1) has a solution if and only if the conditions (2) are satisfied. The proof is given in the form of a theorem.

2. In the second part of the paper, the problem of the uniqueness of the solution of the system (1) is considered. It is shown that the system (1) has a unique solution if and only if the conditions (2) are satisfied. The proof is given in the form of a theorem.

3. In the third part of the paper, the problem of the stability of the solution of the system (1) is considered. It is shown that the system (1) has a stable solution if and only if the conditions (2) are satisfied. The proof is given in the form of a theorem.

4. In the fourth part of the paper, the problem of the asymptotic stability of the solution of the system (1) is considered. It is shown that the system (1) has an asymptotically stable solution if and only if the conditions (2) are satisfied. The proof is given in the form of a theorem.

5. In the fifth part of the paper, the problem of the boundedness of the solution of the system (1) is considered. It is shown that the system (1) has a bounded solution if and only if the conditions (2) are satisfied. The proof is given in the form of a theorem.

6. In the sixth part of the paper, the problem of the periodicity of the solution of the system (1) is considered. It is shown that the system (1) has a periodic solution if and only if the conditions (2) are satisfied. The proof is given in the form of a theorem.

7. In the seventh part of the paper, the problem of the ergodicity of the solution of the system (1) is considered. It is shown that the system (1) has an ergodic solution if and only if the conditions (2) are satisfied. The proof is given in the form of a theorem.

8. In the eighth part of the paper, the problem of the mixing of the solution of the system (1) is considered. It is shown that the system (1) has a mixing solution if and only if the conditions (2) are satisfied. The proof is given in the form of a theorem.

9. In the ninth part of the paper, the problem of the entropy of the solution of the system (1) is considered. It is shown that the system (1) has a solution with finite entropy if and only if the conditions (2) are satisfied. The proof is given in the form of a theorem.

10. In the tenth part of the paper, the problem of the information of the solution of the system (1) is considered. It is shown that the system (1) has a solution with finite information if and only if the conditions (2) are satisfied. The proof is given in the form of a theorem.

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GEORGE SITELIS,	)	APPEAL FROM SUPERIOR
Appellant,	)	
	)	
v.	)	COURT, COOK COUNTY.
	)	
ANGELO MOUHELIS, EVDOKIA	)	
MOUHELIS, and BERNARD S.	)	
NEISTEIN,	)	
Appellees.	)	

13 I.A.<sup>2d</sup> 131

MR. PRESIDING JUSTICE ROBSON DELIVERED THE OPINION  
OF THE COURT.

Plaintiff, George Sitelis, filed a complaint to recover damages from defendants occasioned by the alleged wrongful and malicious trespass to plaintiff's domicile, perpetrated or caused to be perpetrated by the defendants in dispossessing and evicting him and his family forcibly by their malicious abuse of process. The trial court sustained the motions of defendants Mouhelis and of defendant Neistein to dismiss plaintiff's complaint. It denied plaintiff's motion to vacate and set aside the order, and for reconsideration, and denied plaintiff leave to file an amended complaint.

This appeal was originally filed in the Supreme Court and has been transferred to us. Plaintiff's constitutional questions pertaining to due process of law and right of trial by jury cannot be passed upon by us. We must assume that the Supreme Court in transferring the cause to us decided that these issues were not germane to a decision of the instant case.

The complaint contained two counts: the first count being against defendants Mouhelis and the second

Page 4

STANDARD STEEL CO.

Applicant,

v.

AMERICAN TRADING CO.,  
LTD., and  
THE STEEL CO.

Respondents.

IN SENATE, JANUARY 11, 1911.

STANDARD STEEL CO., the petitioner, is a corporation organized under the laws of the State of New York, and has its principal place of business in the City of New York. It is engaged in the manufacture and sale of steel products, and is one of the largest manufacturers of steel in the United States.

The respondents, AMERICAN TRADING CO., LTD., and THE STEEL CO., are also corporations organized under the laws of the State of New York, and have their principal places of business in the City of New York. They are engaged in the importation and sale of foreign-made steel products, and are one of the largest importers of steel in the United States.

The petitioner alleges that the respondents have conspired to restrain trade and commerce between the United States and foreign countries, and to monopolize the market for steel products in the United States. It alleges that the respondents have entered into an agreement to divide the market for steel products between themselves, and to prevent the petitioner from competing with them.

The respondents deny the allegations of the petitioner, and allege that they have no agreement between themselves, and that they are free to compete with the petitioner in the market for steel products.

The court has heard the evidence of both parties, and has concluded that the petitioner has proved its allegations by a preponderance of the evidence. It has found that the respondents have conspired to restrain trade and commerce, and to monopolize the market for steel products in the United States.

The court has granted the relief requested by the petitioner, and has ordered the respondents to cease their conspiracy, and to allow the petitioner to compete freely in the market for steel products.



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count against defendant Neistein, their attorney. In it are many conclusions and irrelevant allegations. The material facts, which the motion to dismiss admits, are that defendants Mouhelis were the owners of a certain improved parcel of real estate situated in the City of Chicago. Plaintiff was their tenant. On or about April 5, 1950, a forcible entry and detainer suit was filed by defendants Mouhelis against the plaintiff in the Municipal Court of Chicago. Defendant Neistein was the attorney of record for defendants Mouhelis. On April 17, 1950, judgment for possession was entered for the Mouhelises against plaintiff. The judgment order provided that the writ of restitution be stayed to June 30, 1950. On May 17, 1950, after the judgment for possession was entered but prior to the date to which the writ of restitution had been stayed, a decree of condemnation was entered in favor of the County of Cook against the property in question in the Circuit Court of Cook County and the defendants Mouhelis were awarded \$18,000. On June 22, 1950, the award was deposited by the County of Cook with the County Treasurer of Cook County. On July 5, 1950, a writ of restitution was served by the bailiff of the Municipal Court of Chicago on plaintiff pursuant to the direction of defendant Neistein acting as attorney for defendants Mouhelis. On July 7, 1950, at the direction of defendant Neistein, the writ of restitution was executed by the bailiff and plaintiff and his family were evicted



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from the apartment in the premises in question.

The motion to dismiss had attached to it as an exhibit the half sheet of the Municipal Court of Chicago setting forth the various proceedings in the forcible entry and detainer action and showing entry of an agreed order for possession. Attached also was the sheriff's return of the service of summons on defendants Mouhelis and plaintiff Sitelis in the condemnation proceedings.

Plaintiff contends that the deposit of the award from the condemnation proceedings with the County Treasurer of Cook County on June 22, 1950, voided the agreed judgment for possession entered in the Municipal Court on April 17, 1950. The deposit of the award did vest title to the premises in the County of Cook and title thus vested in the condemner relates back to the date of the filing of the petition for condemnation. Chicago Park District v. Downey Coal Co., 1 Ill.2d 54. Counsel for plaintiff cites no cases to support his argument and we are unable to ascertain in what way the vesting of title in a third party by condemnation could void the agreed judgment previously entered by defendants Mouhelis and plaintiff in the forcible entry and detainer action. Plaintiff at the time of the entry of the judgment had knowledge that an action was pending to condemn the property. He had been served with summons in the condemnation proceeding<sup>tn</sup> and was defaulted for failure to



file an appearance. Any claimed rights that he might have had as a result of the filing of the condemnation action could have been asserted by him. He agreed, however, to the judgment for possession. Such a judgment is not a judicial determination of the rights of the parties. It does not purport to represent the judgment of the court but merely records the agreement between the parties. A judgment so entered by consent cannot be reviewed by appeal or writ of error. Bergman v. Rhodes, 334 Ill. 137; Cwik v. Condre, 4 Ill. App.2d 380; Watson v. Kenores, 338 Ill. App. 202; Dunlap v. Horton, 337 Ill. App. 106. It can only be set aside for fraud based on a petition filed in the forcible entry and detainer suit pursuant to section 21 of the Municipal Court Act (Ill. Rev. Stat. 1955, chap. 37, par. 376). Dunlap v. Horton, supra. This is not such an action. Plaintiff is bound by the judgment. He cannot by the instant complaint attempt to attack collaterally the agreed judgment and relitigate the issue. City of Elmhurst v. Kegerreis, 392 Ill. 195; Chicago Title and Trust Co. v. National Storage Co., 260 Ill. 485; Ohio National Life Ins. Co. v. Board of Education, 387 Ill. 159; Rose v. Dolejs, 7 Ill. App.2d 267. Plaintiff, therefore, had no right of action against defendants Mouhelis.

Defendant Neistein was an attorney and acting as such for his clients, the defendants Mouhelis. His actions in filing the forcible entry and detainer action, in appearing at the time the consent judgment was entered,



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and in having the writ of restitution issued and executed when plaintiff failed to surrender possession of the premises, were all within the scope of his authority as attorney for defendants Mouhelis. It follows that the complaint did not state a cause of action against him.

Plaintiff's contention that the court's order denying his motion for leave to file an amended complaint was arbitrary, illegal and erroneous, is without merit. The basic legal premise of his action was that the judgment of the Municipal Court was void. We hold it was not. There was, therefore, no legal ground upon which he could sustain the instant case. The order of the trial court is affirmed.

Schwartz and McCormick, JJ., concur.

Order affirmed. Plaintiff's claim

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ROBERT J. SASSEMAN, JR.,  
Appellee,

v.

CORNELIA CAMERON SASSEMAN,  
Appellant.

13 I.A.<sup>2d</sup> 132

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

JUDGE McCORMICK DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint for divorce on

April 29, 1955. Summons was served upon Janet Cameron, a sister of the defendant, and was returned by the sheriff with an endorsement showing such substituted service. On June 6, 1955 the defendant filed her special and limited appearance and her motion to quash service of summons. The trial court, after a hearing, overruled the motion. The defendant thereupon filed an answer to the plaintiff's complaint. In the answer she incorporated a counterclaim alleging that the defendant at various times and places had loaned to the plaintiff \$4,300, which he had not paid, and prayed judgment for that sum. At the hearing the defendant was represented by counsel but did not appear in person; however, evidence was introduced in support of her counterclaim. At the trial the defendant petitioned the court for temporary attorney's fees, which fees were allowed in the final decree entered in favor of the plaintiff.

The defendant contends that the service of the summons upon the defendant was insufficient inasmuch as it was served at the place of abode of the defendant upon her sister, Janet Cameron, who at the time did not reside



there but had a place of abode of her own separate and apart from that of the defendant. Defendant also contends that under Rule 21 of the Illinois Supreme Court which was in force at the time, she did not waive any of her rights with reference to the court's having obtained jurisdiction of her person by filing an answer and counterclaim.

The plaintiff contends that the service was proper legal service, and further that even if it were not, the defendant, by filing a counterclaim asking for affirmative relief, took herself out of the scope of Rule 21.

Under the view we take of this case it will not be necessary to discuss the question of whether or not the defendant in the first instance was properly served. At the time the case was tried the Practice Act (Sec. 38) then in force provided that any demand by any defendant against any plaintiff or codefendant, whether in the nature of set-off, recoupment, cross-bill in equity or otherwise, when pleaded, should be called a counterclaim, which should be a part of the answer but separately designated as a counterclaim. It was further provided that each counterclaim should be pleaded in the same manner and with the same particularity as a complaint and should be complete in itself. Section 48 provided that the defendant might file a motion to dismiss the action on the ground the court lacks jurisdiction of the person of the defendant. Rule 21 of the Supreme Court provided that if the defendant, after denial by the court of a motion filed under section 48 of the



Civil Practice Act, pleads over, he does not by so doing waive his right to urge error in the reviewing court; and this rule further specifically provides that it covers cases where the motion is one attacking the jurisdiction of the court over the person made under a special appearance and the pleading over by the defendant has involved the entry on his part of a general appearance.

The provisions of Rule 21 of the Supreme Court changed the rule in Illinois, which had been that where a motion to quash the original summons had been overruled, and the defendant entered a general appearance, all objections to the ruling of the court on the motion to quash were waived. People v. United Medical Service, 362 Ill. 442, 447; Wilson Brothers v. Haege, 347 Ill. 140, 143; Kinsella v. Cahn, 185 Ill. 208. After the adoption of Rule 21 it was held that where a motion based on the question of the court's lack of jurisdiction over the person of the defendant was properly raised by motion under Section 48, the subsequent filing of a general defense did not prevent the defendant from taking advantage of any error which might have been involved in the court's ruling on the motion; but it seems at least by implication to have been suggested that in order to so rely the defendant must have again raised the jurisdictional question in his answer. This was not done here. Waters v. Heaton, 364 Ill. 150; Ruthfield v. Louisville Fuel Co., 312 Ill. App. 415; People for use of Town of New Trier v. Hale, 320 Ill. App. 645.

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There are no cases in the Illinois reports dealing with the effect which the filing of a counterclaim as a part of the answer would have upon the question of waiver. A counterclaim differs from an answer, and when the counterclaim is incorporated in an answer, the answer becomes both answer and complaint; and while the statute includes recoupment under the denomination counterclaim, in the instant case we are dealing with a counterclaim demanding affirmative relief and upon which, if the defendant was successful, a judgment could have been entered against the plaintiff. In Illinois it is the statutory rule that after a counterclaim is filed the suit cannot, on the motion of the plaintiff, be dismissed without the consent of the counterclaimant (Practice Act, Sec. 52). The Supreme Court of Illinois, in Wilson v. Tromly, 404 Ill. 307, discusses the nature of a counterclaim and says:

"The general purpose of a counterclaim has been long understood and many times defined. It differs from an answer in that a counterclaim must be a cause of action, and it seeks affirmative relief while a defense merely defeats the plaintiff's cause of action by a denial or confession and avoidance. \* \* \* [Citing cases.] A counterclaim is an independent cause of action. \* \* \* [Citing cases.] As involving all of these elements, a counterclaim is usually defined as a cause of action in favor of the defendant against the plaintiff, which the defendant is authorized to litigate in opposition to the plaintiff's claim in the same action. (25 Am. & Eng. Ency. of L., 568; 23 Stand. Ency. of Pl. & Pr. 585.) Since these were commonly understood elements of a counterclaim, as well as the definitions thereof, used prior to the adoption of the Civil Practice Act, we may strongly infer that the term is used in this sense in section 38 of that act, since it is not otherwise defined.





"The only remaining question is to consider whether the contention of appellant that a counterclaim may be considered merely as an answer aids him. Section 38(2) of the Civil Practice Act provides: 'The counterclaim shall be a part of the answer, and shall be designated as a counterclaim.' Section 33(2) of the Civil Practice Act provides that 'Each separate claim or cause of action upon which a separate recovery might be had, shall be stated in a separate count or counterclaim, as the case may be, and each count, counterclaim, defense or reply, shall be separately pleaded, \* \* \*.' From these several provisions of the Civil Practice Act it is apparent that the reference to answer in section 38(2) is a mere designation of the order of pleading rather than giving character to the substantial requirements thereof, and does not waive the requirement of section 38(3) that every counterclaim 'shall be complete in itself.' We have said sufficient above to point out that a counterclaim is affirmative in character, and must contain all of the elements of an original suit, except that it may be filed as a defense, in which affirmative judgment or relief may be obtained."

In jurisdictions which hold that where a motion made under a special appearance to quash the summons is denied, objection thereto is not waived by filing a subsequent general appearance, numerous cases hold that while the defendant may resist the cause of action as presented by the plaintiff to the final conclusion by answer, demurrer or other proper procedure without waiving his exception to the overruling of his objection to want of jurisdiction, he must not go further and invoke the power of the court to bring into the controversy for determination other matters outside of the necessary resistance to the plaintiff's case. 3 Am. Jur. Appearances, Sec. 40; 16 L.R.A. (N.S.) 181; L.R.A. 1916E, 1085. The defendant cites but one case contra to this rule. It is our opinion that the proviso of Rule 21 permitting the defendant to plead over after an adverse decision on a motion based on



the lack of personal jurisdiction without waiving any of his rights to urge error on appeal only meant that he could file whatever pleas were necessary to resist the action brought against him, and that it did not permit him to file a counterclaim even though under the statute the counterclaim must be included in the answer. In our opinion the better rule is that the filing of a counterclaim brings the party under the jurisdiction of the court. When the defendant files a counterclaim he is invoking the jurisdiction of the court to aid him in determining a cause of action which he is litigating against the plaintiff. This goes far beyond a reasonable interpretation of the meaning of "pleading over." By filing a counterclaim seeking a money judgment against the plaintiff and introducing evidence on the trial in support thereof, and by demanding and obtaining attorney's fees for the defendant in plaintiff's divorce action, the defendant has in our opinion submitted herself to the jurisdiction of the court and by so doing has waived any right to urge error on the court's denial of her motion to quash the initial summons.

In the new Practice Act adopted by the legislature, which went into effect January 1, 1956, Section 20 provides that the question of jurisdiction over the person may be raised under a special appearance prior to the filing of any other pleading or motion and that in case the court overrules the objection error cannot be predicated upon the ruling if the defendant takes part in any further proceedings in the case unless the objection is on the ground that the defendant

The first of these is the fact that the
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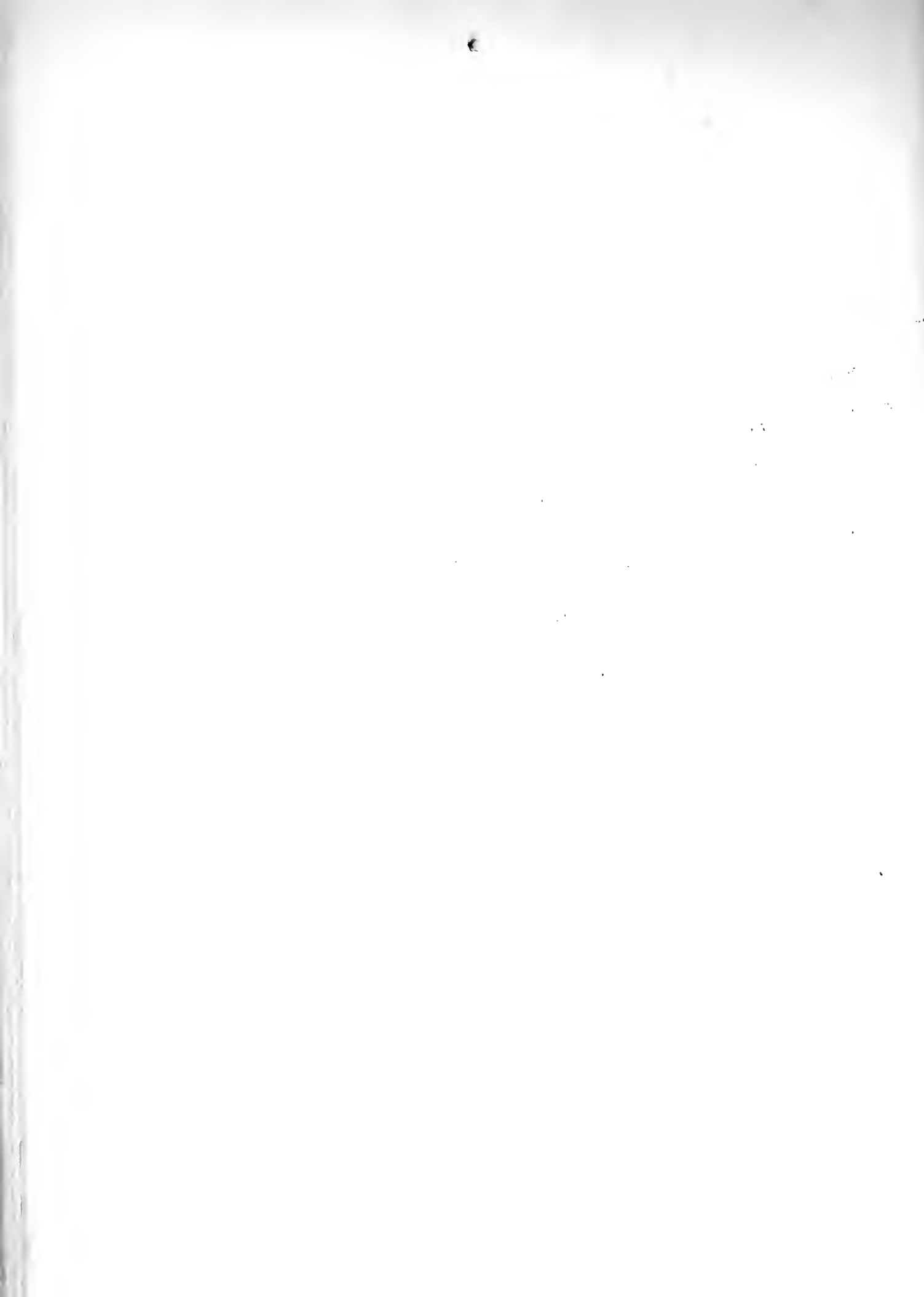
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is not amenable to process issued by a court of the State. The adoption of the Act and the elimination of the provisions contained in former Rule 21 of the Supreme Court as it applied to jurisdiction of the person--whether wise or not--has made the issue herein academic in Illinois.

The judgment of the Superior Court of Cook County is affirmed.

Judgment affirmed.

Robson, P. J., and Schwartz, J., concur.



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Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

February Term, A. D. 1957.

General No. 10093

Agenda No. 10

Mary E. Hering,

Plaintiff-appellee,

vs.

Garlin Hilton,

Defendant-appellant.

13 I.A.<sup>24</sup> 132

appeal from  
Circuit Court of  
McDonough County.

REYNOLD, P. J.

This case arises out of a collision between the automobile driven by the plaintiff in an easterly direction on Illinois Route No. 9, and a truck driven by the defendant, in a northerly direction on a gravel road, at the intersection of the gravel road and Illinois Route No. 9. Illinois Route No. 9 is a two lane concrete highway, and the gravel road is an ordinary two lane gravel highway. There are stop signs located north and south of the intersection for vehicles using the gravel road to stop before entering or crossing the concrete highway. There is a bridge on Illinois Route No. 9 approximately 150 feet west of the intersection,

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spanning a creek, and there is another bridge on the gravel road approximately 300 feet south of the intersection, spanning the same creek which winds about in the general vicinity of the intersection. The plaintiff was driving a 1942 Hudson automobile and was driving about 60 miles per hour. The defendant, employed by the Bushnell Township was working on the township highways and was driving a dump truck, and his work was cutting the grass and weeds around the bridges and cleaning up trash and litter on the gravel highway. The defendant had finished cutting the grass about the bridge south of the intersection and was going to the north of the concrete highway for further work. The defendant upon approaching the intersection stopped his truck south of the intersection and waited for a truck driving west on the concrete highway to turn in front of him and proceed south on the gravel road. According to the testimony of the defendant, after waiting for the truck to pass, he looked to the west, his left, and saw the plaintiff's automobile coming towards the east. His testimony was that he judged the automobile to be about 75 or 80 rods away and that believing it sufficiently far away to cross, he started across the concrete highway. There is some dispute as to just where the collision occurred. According to the testimony of the defendant, his truck was seven or eight feet out on the gravel road to the north at the time of the impact, with only the rear wheels of his truck on the concrete.

spanning a creek, and there is another bridge on the gravel

road approximately 300 feet south of the intersection.

spanning the same creek which winds up it in the general

vicinity of the intersection. The distance from the

a 1943 Hudson automobile and was driven a distance of

per hour. The defendant, who was driving the automobile,

was working on the farm at the time of the accident.

truck, and his work was done in the morning.

the bridge in the morning, and the defendant was

highway. The defendant was driving the automobile

up of the bridge at the time of the accident.

the north side of the creek, and the defendant was

defendant was driving the automobile at the time of

truck south of the intersection.

driving west on the gravel road at the time of

and proceed south on the gravel road at the time of

testimony of the defendant, who was driving the

pass, he looked back over his shoulder at the

automobile at the time of the accident.

he testified that he was driving the automobile

and that he was driving the automobile at the time of

started across the gravel road at the time of

as to just how far he was from the intersection

testimony of the defendant, who was driving the

to tell me the distance from the intersection

incident, with respect to the distance from the

This is corroborated by the witness Eddie Lee Ruark, who testified that at the time of the impact, the truck was off on the gravel road in a northwest direction. This is also corroborated by another witness Clinton E. Griffith. The plaintiff testified that the impact was in the center of the concrete highway. Other than the dispute as to the exact point of collision and some other minor matters, the facts of the case are fairly well agreed upon by the parties. The plaintiff was permanently injured and brought suit for damages.

Originally the suit was on a one count complaint charging the defendant with negligence. This was denied by the defendant's answer, and at the close of the plaintiff's evidence, the defendant asked for and obtained leave to file an affirmative defense, and in this affirmative defense, the defendant raised the question of whether or not the defendant, being engaged in work for the Bushnell Township in maintaining and working on the public roads, and being thus engaged in a governmental duty at the time of the collision, could be charged with negligence. To this affirmative defense the plaintiff filed a denial, and the trial proceeded with the introduction of the defendant's evidence. At the close of all the evidence, the defendant made a motion for a directed verdict and the motion was allowed. Then the plaintiff asked and obtained leave of court to file an additional count to the complaint and in the additional count charged the defendant

[illegible]

with wilful and wanton misconduct. No further evidence was introduced. Defendant then made a motion for a directed verdict as to the second count and this motion was denied. The case was submitted to the jury and the jury returned a verdict awarding the plaintiff damages in the sum of \$7000.00. From that verdict and judgment thereon, the defendant appeals to this court.

The appeal raised three questions, but for the purpose of this appeal only one need be considered, namely, did the trial court err in denying the defendant's motion for a directed verdict on the wilful and wanton count? After the appeal was perfected and before this court, a further question arose, namely, could the plaintiff, after the appeal by the defendant, claim the right to assign error on the part of the trial judge in sustaining the motion for a directed verdict as to Count I of the complaint, and ask for affirmative relief as to that matter without cross appeal.

On the question as to whether or not the trial judge should have sustained the motion for a directed verdict as to the wilful and wanton count, it must be conceded that if there is any evidence in the record which, standing alone and taken with all its intendants most favorable to the plaintiff, tends to prove the material element of her case, namely wilful and wanton misconduct, then the trial court properly denied the motion. Eckhardt v. Hickman, 349 Ill. App. 474; Poulson v. Poulson, 1 Ill. App. 2nd 201; Dargie v. East End Bolders Club, 346 Ill. App. 480; Donnelly v. Pennsylvania R. Co., 412 Ill. 115.

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However, if there is no evidence in the record which, standing alone and taken with all its intendment most favorable to the plaintiff, tended to prove the material element of wilful and wanton misconduct on the part of the defendant, it then became the duty of the trial judge to grant the motion. Randolph v. New York Cent. R. Co., 334 Ill. App. 268; Carrell v. New York Cent. R. Co., 317 Ill. App. 481, affirmed 384 Ill. 595. This same yardstick governing the action of the trial court must govern the action of this court. Roadruck v. Schultz, 333 Ill. App. 476. The motion for a directed verdict, like a motion for judgment notwithstanding the verdict presents only a question of law as to whether when all the evidence is considered, together with all reasonable inferences that may be drawn therefrom, in its aspect most favorable to the plaintiff there is evidence to prove the claim of wilful and wanton misconduct on the part of the defendant. Peterson v. Hendrickson, 335 Ill. App. 223.

Since the matter thus presented is a question of law, it is necessary to examine the record of evidence, and then apply the law governing proof of wilful and wanton acts.

The plaintiff testified that the paved highway on which she was driving, Illinois Route No. 9, was straight at and near the intersection; that she was driving between 55 and 60 miles per hour; that she first saw the truck of the

However, if there is no evidence in the record,

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defendant after she crossed the bridge, or about 150 feet away; that when she first saw the truck it was almost to the concrete highway; that she pulled to the left seeking to avoid the collision and seeing that she could not, pulled back to the right and struck the truck about the center of the highway; that the defendant as he crossed the concrete highway seemed to increase his speed, but that she could not estimate the speed of the truck; that after the collision the truck was off the concrete highway to the north and part of her car was also off the highway; that she did not see the truck stop and did not see it coming north on the gravel road and that the first time she saw the truck, it was about 150 feet away.

Testimony was introduced by the plaintiff showing that the defendant was given an arrest ticket for right-of-way violation and that he appeared, waived a jury trial, pleaded guilty and was fined \$5.00 and costs. The defendant denied that he pleaded guilty and stated he did not know why he was fined, but admitted paying the fine and costs. The plaintiff also offered in testimony the location of the stop sign to the south of Illinois Route No. 9 and it was established that this sign was 31 feet south of the pavement. Also that there was a small grade of the gravel road as it came up to the highway.

defendant after she crossed the bridge, at about 150 feet

away; that when she first saw the truck it was about 10

the concrete highway; that she, when it was first seen,

to avoid the collision and turn to the right, and then

back to the right and struck the truck on the

the highway; that the defendant was driving on the

highway seemed to increase the speed of the truck

not estimate the speed of the truck at the time

the truck was on the highway; that the defendant

of her car was on the highway at the time

the truck struck her car on the highway

road and that the truck was on the highway

about 150 feet away.

Testimony of the defendant is that

the defendant was driving on the highway

violation and that the defendant was

guilty of the violation.

That the defendant was driving on the highway

was found, that the defendant was

pleaded guilty to the violation.

stop sign is on the highway

outstanding on the highway

also that the defendant was

came up to the stop sign.

The testimony of the defendant was that he was driving the truck of Bushnell Township at the time of the accident; that his duties were to go along the roadway, cleaning up the weeds where the mower did not reach, picking up cans and bottles and trash on the roadway; that after finishing his work south of the concrete pavement, he got in the truck and drove up to the pavement and stopped; that he waited for a truck coming from the east to turn in front of him and proceed south on the gravel road; that he looked to the west and saw the car of the plaintiff coming and estimated its distance at that time at 75 or 80 rods, or approximately one-quarter of a mile; that he did not look to the west again but proceeded to go across the concrete road; that the car turned to the north and struck the truck when it was seven or eight feet out on the gravel north of the hard road; that the tracks of the car showed that it turned and crossed over to the north part of the pavement and struck the truck.

The testimony of Cletus Rufenacht, the driver of the truck that pulled around the truck of the defendant and proceeded south on the gravel road before the accident, testified that in his opinion the car was four or five hundred feet west of the bridge when he made the turn to the south; that after the accident he went back to the scene of the accident and the car was partly under the truck; that there was water or alcohol spilled out from the car on

The testimony of the defendant was that he was driving  
the truck of the defendant towards the time of the accident  
that his duties were to deliver the goods, and that  
the goods were the same as the goods of the defendant  
bottles and that he was the owner of the bottles  
with a view of the defendant's business and that he  
drove up to the store  
that corner of the street and that he was the owner  
of the car and that he was the owner of the car  
at that time and that he was the owner of the car  
of a car and that he was the owner of the car  
to do so and that he was the owner of the car  
with a view of the defendant's business and that he  
out of the car and that he was the owner of the car  
the car and that he was the owner of the car  
part of the car and that he was the owner of the car  
the car and that he was the owner of the car  
first of the car and that he was the owner of the car  
expressed in the car and that he was the owner of the car  
testified that he was the owner of the car  
handing the car and that he was the owner of the car  
the car and that he was the owner of the car  
same as the car and that he was the owner of the car  
that he was the owner of the car

the gravel north of the concrete highway; that the automobile was almost all off the concrete; that the tracks showed that the car had crossed the middle line of asphalt some 20 or 30 feet east of the bridge and proceeded to the point of impact.

The testimony of Eddie Lee Ruark, a witness for the defense, testified that he and his father were driving their truck along the gravel road south of the paved highway; that he saw the defendant make the stop south of the intersection and the truck of Oletus Eufenacht pull around him and come south on the gravel road; that the truck was going across the highway when the car was about one block west of the bridge across the paved highway; that in his opinion the car was traveling at about 60 miles per hour.

The testimony of Clinton E. Griffith, Highway Road Commissioner for Bushnell Township was that he did not see the accident but went to the scene later; that there were marks or tracks from the bridge on the concrete highway going across to the north side of the pavement to the point of impact; that these tracks extended from the bridge to the back wheels of the car.

"Wilful and wanton misconduct" has been defined by our courts in the following language: "Ill will is not a necessary element of a wanton act. To constitute an act wanton, the party doing the act or failing to act must be conscious of his conduct, and though having no intent to

the gravel north of the concrete driveway; the car was almost all off the concrete; the car had crossed the sidewalk and was on the edge of the road.

injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury. An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences makes a case of constructive or legal wilfulness." Streeter v. Humrichouse, 357 Ill. 234; Jeneary v. Chicago and Interurban Traction Co., 306 Ill. 392; Bartolucci v. Palletti, 382 Ill. 168; Mower v. Williams, 402 Ill. 486.

As said in the Mower v. Williams case, "As to whether or not there has been wilful and wanton conduct in any given case necessitates close scrutiny of the facts as disclosed by the evidence, and while the rule of law does not vary, the facts to which the law is applicable always present divergent circumstances and facts which, in most instances, are wholly dissimilar." This language was cited with approval in the case of Myers v. Krajcska, 8 Ill. 2nd 322.

In reading the evidence there does not appear any testimony that would support the charge of wilful and wanton misconduct. There is no evidence that the defendant was conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct would naturally and probably result in injury. There was no

injure, must be conscious, from his knowledge of the  
surrounding circumstances and existing conditions, that his  
conduct will naturally or necessarily result in the  
intentional commission of a crime.  
of the person, directly or indirectly, in the  
of care for the person, or for the property of the  
exhibits a course of conduct which is  
case of such a nature as to constitute a  
Harris, 1907, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.



showing of an intentional disregard of a known duty, or an absence of care for the life, person or property of others, such as exhibited a conscious indifference to consequences. There is no evidence that the defendant, before the collision had any knowledge of the impending danger of a collision with the car of the plaintiff and failed to exercise ordinary care to prevent it, which was the basis of the decision in the case of Gaiennie v. Pringer, 5 Ill. App. 2nd 413. The trial court by allowing the motion for a directed verdict for the defendant as to Count I of the complaint, which was simple negligence, in effect held that there was no evidence upon which to sustain a verdict for the plaintiff. In allowing the motion for directed verdict as to Count I the trial court held that there was no evidence in the record which, standing alone and taken with all its inferences most favorable to the plaintiff, tended to prove the material element in that count, namely negligence. A defendant may be guilty of negligence and not guilty of wilful and wanton misconduct. But in this case there is even less evidence of wilful and wanton misconduct than that of negligence. The defendant thought he had time to cross the concrete highway before the car of the plaintiff arrived at the intersection. It was a mistake of judgment. But there appears no element required to prove wilful and wanton misconduct. After a careful examination of the evidence and applying the law in Illinois to that evidence, this court must hold that the trial court erred in denying the motion of the defendant for a directed verdict as to Count II of the complaint.

showing of an intentional disregard for the life, health or safety of others, or such as exhibited a conscious indifference to the rights of others.

There is no evidence of any connection on the ground.

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Page 1 of 1

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The defendant complains of plaintiff's instructions Nos. 6, 19 and 20. An examination of all the instructions given show that the jury was properly instructed and we find no reversible error in the instructions.

The question as to the right of the plaintiff to assign error and ask for affirmative relief without cross appeal, requires an examination and interpretation of the language in Supreme Court Rule No. 35. The pertinent parts of that rule are as follows:-

"(1) Each appellee who desires to prosecute a cross appeal from all or any part of the judgment, decision, order or decree, . . . shall, within 10 days after service upon him of notice of appeal, serve a notice upon each party or attorney or firm of attorneys who signed the notice of appeal, and upon each appellee, person or officer entitled to receive notice of an appeal, and file a copy thereof in the trial court.

"(2) (c) A notice of cross appeal shall be substantially in the form required for appellant's notice of appeal."

The plaintiff takes the position that it is not necessary for her to file a cross appeal, and that this court can review the question of whether or not the ruling of the court in sustaining and allowing the motion for a directed verdict for the defendant as to Count I of the complaint was proper. In support of this position, the



plaintiff cites the case of The People v. Bradford, 372 Ill. 63, but that case does not support the plaintiff's position. In that case the court held that since no part of the judgment was adverse to the appellees, the appellees were in no position to prosecute a cross-appeal. Here the allowing of the motion was adverse to the plaintiff. The same situation arose in the case of McNulty v. Hotel Sherman, 280 Ill. App. 325, where the court there said: "Defendant, having prevailed in the lower court and not being in any way aggrieved by the court's order or any part thereof, could not have appealed or sued out a writ of error, and, therefore, by analogy, would not have been required to assign cross errors." There again, was a case where the appellee had no adverse ruling. There is no question that a reversal of the ruling of the trial court allowing a directed verdict as to Count I of the complaint would be affirmative relief. In the case of Ashton v. Sweeney, 350 Ill. App. 135, that court said: "If any affirmative relief is requested by respondent Ashton, he is required to give notice of cross-appeal and comply with the rules with reference to cross-appeals under Supreme Court Rule 35."

In the case of Bryant v. Lakeside Galleries, 402 Ill. 466, the court there held: "Appellee has filed no cross-appeal from such findings of the trial court, but in his brief and argument filed in this court he urges that the court's decree should

plaintiff cites the case of The People v. Bradford, 372 Ill. 63, but that case does not support the plaintiff's position. In that case the court held that since no part of the judgment was adverse to the appellees, the appellees were in no position to prosecute a cross-appeal. Here the allowing of the motion was adverse to the plaintiff. The same situation arose in the case of McNulty v. Hotel Chicago, 360 Ill. App. 3d, where the court there said: "Defendant, having prevailed in the lower court and not being in any way aggrieved by the court's order or any part thereof, could not have appealed or sought a writ of error, and, therefore, by analogy, must not have been required to assign cross errors." There again, was a case where the appellee had no adverse ruling. There is no question that a reversal of the ruling of the trial court allowing a directed verdict as to Count 1 of the complaint would be affirmatively and in the case of Ashton v. Jensen, 350 Ill. App. 3d, 198, that court said: "If any affirmative relief is requested by the plaintiff Ashton, he is required to give notice of cross-appeal and comply with the rules with reference to cross-appeals as set forth in Court Rule 35." In the case of Haynes v. Lakeside Villas, 402 Ill. App. 3d, the court there held: "Appellee's trial no cross appeal from such findings of the trial court, but in its brief and argument filed in this court he urges that the court's decree should

be modified in those respects. In the absence of a cross-appeal the matters urged by appellee are not properly before us, and thus not subject to review on this appeal." And in the case of American Dixie Shops v. Springfield Lords, Inc., 8 Ill. App. 2nd 129, the court there said: "Supreme Court Rule 35 which requires notice of intention to prosecute a cross-appeal within ten days after service of notice of appeal contemplates an appeal from the same judgment that the appellants have appealed from." In the case of Clodfelter v. Van Fossan, 394 Ill. 29, in passing on a similar question the court said: "The contention of appellees is necessarily confined to this issue since they did not prosecute a cross-appeal nor assign cross errors as to the action of the court in sustaining the other transactions. . . ." And in the case of Parish Bank & Trust Co. v. Uptown Sales Service Co., 300 Ill. App. 73, the court held: "This rule for cross appeals contemplates an appeal from the same judgment that the appellants have appealed from."

Here, the judgment appealed from by the appellants, was the judgment against him based upon wilful and wanton misconduct. In the light of the cases cited, this court must hold that the appeal is limited to the judgment appealed from, namely the judgment against the defendant for wilful and wanton misconduct, and that the matter of the trial

be modified in those respects. In the absence of a contrary  
the matters urged by appellee are not properly before the  
thus not subject to review on this appeal. 101 S. Ct. 1111  
American Dixie Paper Co. v. International Paper Co., 309 U.S. 101  
1939, the court there said: "Where notice of a proposed  
notice of intention to produce a new product is given to the  
after service of notice of a proposed new product, the  
the same judgment should be rendered in the case of a  
the case of International Paper Co. v. American Dixie Paper Co.  
a similar question is presented. The court there said:  
in essentially identical facts. The court there said:  
a cross-appeal was made. The court there said:  
court in International Paper Co. v. American Dixie Paper Co.  
case of International Paper Co. v. American Dixie Paper Co.  
111 App. 701, the court there said: "The court there said:  
court there said: "The court there said: "The court there said:  
have appeared there."  
Here, the facts are identical. The court there said:  
was the fact that the court there said: "The court there said:  
discovery. In the case of International Paper Co. v. American Dixie Paper Co.  
and held that the court there said: "The court there said:  
from, a new and improved product was developed. The court there said:  
and without regard to the fact that the court there said:



court's action relating to the charge of negligence, in the absence of a cross-appeal by the plaintiff is not before this court.

For the reasons stated, the judgment is reversed.

reversed.

Judge Roeth took no part in the consideration of this case.

court's action relating to the case. The court's action  
absence of a cross-examination of the witness.  
this court.

For the reasons stated, the court is of the opinion

Judge Smith took no part in the consideration of this case.

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FAIRFIELD SAVINGS AND LOAN  
ASSOCIATION,

Plaintiff - Appellee,

v.

CENTRAL NATIONAL BANK IN CHICAGO, as  
trustee,

Defendant,

JEROME CINMAN,

Cross - Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

13 I.A.<sup>2d</sup> 133

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE  
COURT.

Cross-defendant Jerome Cinman appeals from a decree approving the sale of real estate had pursuant to a decree of foreclosure. Plaintiff brought the foreclosure proceeding to foreclose a mortgage upon the real estate in question, executed by defendant Central National Bank, as trustee, to secure its note for \$9500. The mortgage and note provided that there was to be no personal liability on the part of the trustee, and any deficiency resulting from any sale of the property was to be paid and satisfied "only" out of rents, issues and profits.

Defendant Walter Evans, a tenant in possession under a contract to purchase, filed a cross-bill, claiming that he was the true owner of the equity, having fully complied with the contract to purchase. Jerome Cinman was made cross-defendant. A reference to a master for hearing resulted in a report recommending the dismissal of the cross-bill, and a decree was entered dismissing the cross-complaint for want



-2-

of equity, and containing a finding that Jerome Cinman was the owner of the equity. It directed that \$700, deposited by Evans with plaintiff as rent, be retained by plaintiff and credited against the amount found due to plaintiff. There was no appeal from this decree.

A decree of foreclosure was entered, based upon a report of a master, who heard the evidence, which decree found that there was due to plaintiff as of July 31, 1955, \$12,920.52, and "that plaintiff would necessarily incur further expense, for which it is entitled to be reimbursed." The decree fixed the master's fees at \$450. There was no appeal from this decree.

At the time of the entry of the decree approving the sale, there had been deposited with plaintiff by Evans a total of \$700. The decree approving the sale found that the gross bid for the property was \$13,000, and that after computing the amount due to plaintiff to the date of the sale, there was a deficiency of \$775.30.

No objections were filed by Cinman to the report of the master, but objections were filed by him to the proposed decree confirming the master's report of sale. The principal basis for the objections was the finding as to the amount of the deficiency, in connection with which Cinman argues that with the application of the \$700 rent deposited by Evans, there remained a surplus from the sale instead of a deficiency in the sum of \$700, which should rightfully belong to Cinman.



There is no report of proceedings in this record attending the hearing by the court on the objections of Cinman to the proposed decree confirming the sale. The decree recites:

"That the Master has in all things proceeded in due form of law \* \* \*

" \* \* \*

"And \* \* \* has made due and proper distribution of said proceeds of said sale and has filed herein receipts showing the receipt of the distributive share of said sum received by the distributees thereof \* \* \*."

It directed that the \$700 deposited by Evans as rent be retained by plaintiff and applied in "full payment and satisfaction of the deficiency."

The receipts filed by the master, showing how the proceeds of the sale were applied and distributed, and resulting in the deficiency, are not before us. We cannot go behind the recital in the decree in the absence of such report of proceedings, and we must assume that what was before the chancellor upon the hearing, as to the total expense incurred by plaintiff and the final amount due, was sufficient to justify the decree. Jaffe v. Tenenholtz, 333 Ill. App. 357; Ferro v. Daros, 343 Ill. App. 267 (Abst.); ABC Loan Co. v. Campbell, 1 Ill. App. 2d 297 (Abst.); Richardson v. United States Mortgage and Trust Co., 194 Ill. 259.

The principal contention by Cinman is, that where the complaint alleged there was due plaintiff \$9,875.56, and where the decree of foreclosure found the amount due to be

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the 1990s, the number of people in the world who are undernourished has declined from 1.1 billion to 800 million. The number of people who are malnourished has declined from 1.5 billion to 1 billion. The number of people who are obese has increased from 100 million to 300 million. The number of people who are overweight has increased from 100 million to 300 million. The number of people who are obese and overweight has increased from 100 million to 300 million. The number of people who are obese and overweight has increased from 100 million to 300 million.

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\$12,920.52, a sale which brought \$13,000 would preclude any finding of a deficiency. There is no merit in this contention, since the rights of the parties must be determined in equity as of the time of the entry of a decree, and not as of the time of the filing of the complaint. Moehling v. Pierce, 3 Ill. 2d 418, 424; Baker v. Salzenstein, 314 Ill. 226; Dennis v. Naegele, 11 Ill. App. 2d 239 (Abst.), 136 N. E. 2d 535. Therefore, the rights of the parties in the instant case must be determined as of the time of the entry of the decree approving the master's report of sale and distribution.

Upon this state of the record, we must presume, in the absence of the evidence considered by the chancellor, that the decree was fully justified, and it is therefore affirmed.

AFFIRMED.

KILEY AND LEWE, JJ., CONCUR.

The above information was obtained from a review of the records of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation, and is being furnished to you for your information.

*Journal of Interpersonal Violence* 26(10) 1978-1997  
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## Agenda 19

## Agenda 19

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FEBRUARY TERM, A. D. 1957

13 I.A.<sup>2d</sup> 134

OLAN BLACK,  
Plaintiff-Appellee,  
vs.  
HOMER WHITE,  
Defendant-Appellant.

Appeal from the  
Circuit Court of  
Lake County.

EOVALDI --- J.

This action was brought to recover damages occasioned by the alleged negligence of the defendant in improperly caring for and maintaining a tractor and its component parts; defendant allegedly having knowledge of the tractor's defective condition and plaintiff not knowing or having reason to know of same; and defendant not advising or warning plaintiff of said defective condition. The jury rendered a verdict for \$10,500.00 upon which the court entered judgment from which this appeal is taken.

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The defendant's theory is that the alleged defect causing plaintiff's injury is not the defect of which the defendant is alleged to have had knowledge; that the trial judge should have directed a verdict in favor of the defendant; that the judgment is contrary to the manifest weight of the evidence; that the prejudicial misconduct of counsel created sympathy for the plaintiff and prejudice to the defendant; that the verdict is grossly excessive, and that a new trial should have been granted.

Plaintiff, age 58, and a farmer by trade, was working for defendant on defendant's Wisconsin farm on April 12, 1955, the date of the accident and injury. Defendant had one farm in Illinois and one in Wisconsin, and plaintiff and his son Newman worked on both farms. Defendant had several tractors at the Illinois farm, including an old Case tractor, over 20 years old, on which the seat was gone, which had stood in a field 6 or 8 miles south of the Illinois farm, and had been pulled home by defendant and plaintiff's son, and which had not been used from February to the date of the accident. It had sat out in the open unused for a substantial part of the previous winter.

Defendant cranked the tractor, got it running and directed plaintiff to get on it and back it into a manure spreader. Plaintiff got on, pulled the clutch back to put it in reverse and backed to within 6 or 8 feet from the spreader, then pushed the clutch forward to release the gears.

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When he attempted to push the clutch forward it did not release, and although plaintiff pushed forward on it several times he could not get it to release from reverse gear, as a result of which it continued backing and ran into the spreader, injuring plaintiff's left foot. Prior to the accident, defendant did not say anything to plaintiff about the clutch or about a defective clutch, or about using hand brakes or foot brakes.

After the accident, plaintiff's son Newman, age 37, testified that he had a conversation with defendant at the barn and defendant told him "He would have to watch the clutch, because if he pushed it in too far it wouldn't stop, it wouldn't release. He said you have to use the foot brake". The son testified that this was the first time defendant had told him that. Defendant denied that such conversation took place, and testified that the clutch was in excellent condition before, at and after the accident.

Emphasis has been placed by defendant on the evidence adduced at the trial as it related to two issues: (a) Was the tractor defective in that after shifting into reverse gear it would not shift into neutral gear? (b) Did the defendant know of this defective condition? There is evidence in the record to support the conclusion that the clutch of the tractor being operated by the plaintiff was defective in that after shifting into reverse gear it would not shift normally into neutral gear. Plaintiff's evidence

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established the fact that the clutch "stuck" while the tractor was in reverse gear, and that by reason of the clutch sticking he was unable to stop the tractor, and backed into the manure spreader where his foot was caught and injured. While defendant contends that the clutch did not stick in the precise way in which plaintiff's counsel described the operation in his statement to the jury, yet, when all of the evidence is considered it fairly shows that the clutch "stuck" in reverse position while plaintiff was pushing it forward.

The other factual question argued by defendant is that he did not know of the particular defect relied on by the plaintiff. Plaintiff's son, Newman, who was also employed by the defendant and witnessed the accident, testified as follows:

"Q. Did you have any conversation with Mr. White after the accident? A. Yes, sir.

Q. Where? A. At the barn.

Q. Who was present? A. Just me and Mr. White.

Q. What did Mr. White say and what did you say? A. He said he would have to watch the clutch, because if he pushed it in too far it wouldn't stop, it wouldn't release. He said you have to use the foot brake.

Q. Is that the first time he told you that? A. Yes."

In the context in which the question was asked, and in view of all the circumstances, the jury could reasonably reach the conclusion that this conversation took place on the day of the accident. By stating "after the accident" that "he would have to watch the clutch" and that if it was pushed in too far "it wouldn't release," the defendant admitted that he knew

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that under some circumstances the clutch would not release. The tractor had been in his possession and under his control for sometime prior to the accident, and the jury had the right to infer from this statement that the defendant had prior notice of the defective condition of the clutch. Plaintiff claimed that the clutch stuck when he "pushed" the clutch forward to release it, and that nevertheless the tractor "kept coming back." On the basis of this evidence the jury could properly charge the defendant with prior knowledge of the particular defect which plaintiff claims caused the accident.

On a motion for a directed verdict, the court does not weigh the evidence. The court may properly consider only the evidence and inferences most favorable to the plaintiff; and it is only where there is no evidence tending to prove plaintiff's case that the court can grant a motion for directed verdict. *Lindroth v. Walgreen Co.*, 407 Ill. 121, 130; *Beverly v. Central Ill. Elec. & Gas Co.*, 5 Ill. App. 2d 27. It is not the province of this court to substitute its judgment for that of the jury, or to upset the verdict even if it were to reach a contrary conclusion, for that would be invading the constitutional prerogative of the jury. *Bliss v. Knapp*, 331 Ill. App. 45, @ 50. To be against the "manifest weight of the evidence" requires that an opposite conclusion be clearly evident. *Olin Industries, Inc. v. Wuellner*, 1 Ill. App. 2d 267, 271; *Schneiderman v. Interstate*

• Prüfung : 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

1. The first group of people who are not allowed to enter the country are those who are on the "No Fly List". This list is maintained by the Federal Bureau of Investigation (FBI) and the Department of Homeland Security. It includes individuals who are suspected of being involved in terrorism or other activities that could threaten the national security.

• *Journal of the American Medical Association*, 1991; 266: 1033-1036

1. *Phragmites australis* (Cav.) Trin. ex Steud.

Transit Lines, Inc. 331 Ill. App. 143, 147. We cannot say that the judgment is against the manifest weight of the evidence in this case.

In our opinion the verdict and judgment is excessive. At the time of his injury, plaintiff received \$150.00 a month, a house to live in, was furnished with two cows, receiving approximately \$35 a month for cream which he shipped, was given three dozen eggs a week, and was to be furnished his meat by defendant. After his injury, plaintiff was taken to the hospital where he remained for 5 days. The hospital bill was \$78.50 and the doctor bill for treatment following the accident was \$100. He had pain and swelling in his left foot, and it was discolored. He was given shots from time to time to relieve pain, his foot was elevated, one x-ray was taken, disclosing a chip fracture of the heel bone and it involved the joint surface of that bone. His leg was in a cast for a week and he used crutches until the latter part of May. He used his cane until about the first of December. Within a short time after his injuries on April 12, 1955, and in late May or June he drove a tractor where his son worked in Roselle, Illinois. He worked six or seven hours of an afternoon about five days in May, 1955, and 100 hours at \$1.00 an hour in June, 1955 at the Tom Hogan farm. He stated that he did no work on foot. He went to Longton, Kansas in July and worked about 200 hours there in November and December, earning about \$200, at the rate of \$1.00 an



hour. There he did some painting where he was able to sit down, and tried to do some spading which he stated gave him a lot of pain. The employer gave him rest periods, and the job on which he was working was finally completed. He testified that his work terminated because the job was finished. He testified that he had not worked for wages since Christmas, 1955, and that he had not done anything except feed a dozen chickens. He did not testify that he could not work.

The attending physician testified that there was a chip fracture of the heel bone and a hematoma or blood clot and that he put the foot in a cast and applied a walking calipher to give plaintiff some relief from the pain and to enable him to get about better. He examined plaintiff approximately one year after the accident and found that the foot was still painful, sensitive and tender, determining this by palpation. He was asked this question:

"Q. Based upon your diagnosis and treatment of Mr. Olan Black do you have an opinion as to what his condition will be in the future?"

A. One has to hold his opinion guarded because of the extent of the injury that was done to the soft tissue. It is difficult to volunteer to what extent because of the length of time it took him to get well and he is not well now. We do not know if it is his foot and he has to bear the weight of his body on it, and damaged tissue is repaired by scar tissue, and scar tissue can be painful in any part of the body, and particularly on the foot it may give pain for years and may give pain the rest of his life, on the other hand it may entirely go away.

Q. How soon?





A. There is no way of telling. It is already a year's time and it is still painful. I couldn't say."

The evidence does not sustain the amount of the verdict in this case. If the plaintiff shall within fifteen days remit the sum of \$3,000, judgment in the sum of \$7500 will be affirmed. If the plaintiff does not so remit, the judgment will be reversed and the cause remanded for a new trial.

Dove, P. J. Concurs

Affirmed on remittitur.

*P. J. Dove*  
*Concurs*

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Abst

Gen. No. 11015

Agenda 21

IN THE

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APPELLATE COURT OF ILLINOIS

MAR 12 1957

SECOND DISTRICT

PAUL V. WUNDER  
Clerk Appellate Court, Second District

FEBRUARY TERM, A. D. 1957.

PEOPLE OF THE STATE OF ILLINOIS,  
ex rel. JOHN J. KELLY, Etc.

Plaintiff-Appellee,

-vs-

AVERY COONLEY SCHOOL,

Defendant-Appellant.

13 I.A.<sup>2d</sup> 135

Appeal from

County Court

DuPage County

CROW, J.

This is an application, in the County Court of DuPage County, for an order of judgment against and for sale of certain real estate in DuPage County for real estate taxes for the years 1946 - 1954, inclusive, by the People of the State of Illinois on the relation of John J. Kelly, County Treasurer and ex-officio County Collector of DuPage County, plaintiff-appellee, to which the Avery Coonley School, a corporation not for profit, defendant-appellant, filed objections, based upon the contention that, under the applicable provisions of the Constitution and Statutes, the real estate was exempt from taxation because it was used for school purposes.

The matter was heard in the Trial Court on a stipulated statement of facts. The total taxes involved are \$3982.72. The

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MAR 13 1957

PAUL V. WUNDER  
Clerk Appellate Court Second District

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Trial Court sustained the objections with reference to the assessment on the land itself but overruled the objections with respect to the assessments on the improvements on the land involved. An Order was entered that the assessment as to the land be abated and the taxes be revised, reassessed, and reduced in the manner set out in the order, and that the County Collector issue revised tax bills pursuant thereto. The Avery Coonley School, the defendant, appeals. There is no cross appeal by the People etc., the plaintiff. The appeal is submitted on an agreed statement of facts.

Under Section 75 of the Civil Practice Act, CH. 110, ILL. REV. STATS., 1955, par. 75, -- "(1) appeals shall be taken directly to the Supreme Court --- (b) in all cases relating to revenue, --- ". In this case the plaintiff-appellee, a recognized authority of the State, or one of its political subdivisions authorized by law to assess or collect taxes, is attempting to proceed under the law, and questions have arisen between that authority and the party from whom the taxes are demanded, the defendant-appellant. The case, therefore, relates to revenue: PEOPLE ex rel. HULLYER v. MORTON et al. (1940) 373 Ill. 72; PEOPLE ex rel. HEMPHEN v. B. and O. R.R. CO. (1942) 379 Ill. 543; TOWN OF THORNTON et al. v. WINTERHOFF et al. (1950) 406 Ill. 113; Cf. PEOPLE v. SMITH et al. (1952) 413 Ill. 382.

The case was wrongly appealed to the Appellate Court, the appeal should have been taken directly to the Supreme Court, and it is our duty, on our own motion, neither party having moved to transfer, to transfer the case and appeal to the Supreme Court and to direct the Clerk to transmit the transcript

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and all files therein with the order of transfer to the Clerk  
of the Supreme Court: CH. 110, ILL. REV. STATS., 1955, par.  
86.

This case and this appeal is, accordingly, trans-  
ferred to the Supreme Court of Illinois, and an order of trans-  
fer is entered contemporaneously with the filing of this  
opinion.

TRANSFERRED TO THE SUPREME COURT  
OF ILLINOIS.

*Douglas J. concurs*

*274 B. 1000*

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IN THE

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APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAR 26 1957

OCTOBER TERM, A. D. 1956

PAUL V. WUNDER  
Clerk Appellate Court Second District

13 I.A.<sup>2d</sup> 163

DAVID J. REINERT, a Minor, by CLIF-  
FORD W. REINERT, his father and  
next friend,  
Plaintiff-Appellee,

vs.

ROGER W. WILLING,  
Defendant-Appellant.

Appeal from  
Circuit Court  
Kane County.  
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CROW, J.

This is an appeal from a judgment entered upon a verdict for \$10,000.00 in an automobile personal injury case in favor of the plaintiff, David J. Reinert, a minor, and against the defendant Roger W. Willing, another minor. The Trial Court denied motions for judgment notwithstanding the verdict and for a new trial.

The action arose out of a collision between a car driven by the plaintiff, a minor, and a car driven by the defendant, Roger W. Willing, also a minor, on a macadam or black top country road known as Hopps Road, Kane County, about 11:00 p.m., February 26, 1953. The defendant's car was being driven in a southerly direction and as it came over the crest of a hill it and a car driven by the plaintiff going in the opposite, or northerly, direction collided.

W. B. M. S.

Dep. No. 10974

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MAR 26 1957

HALL V. WUNDER  
Rock Appeal Court Second District

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David Kasten, who was a passenger in the car driven by David J. Reinert, the plaintiff in the case before us, had, as plaintiff, also filed a separate suit against David J. Reinert and Roger W. Willing, as defendants, charging Reinert with wilful and wanton misconduct, and charging Willing with negligence, and alleging various personal injuries to the plaintiff therein, David Kasten. The two suits, KASTEN v. WILLING et al., and the present suit, REINERT et al. v. WILLING, were consolidated for trial, on Reinert's motion.

The complaint in this present suit, REINERT et al. v. WILLING, consisted of three counts, Count I being the claim of the plaintiff, David J. Reinert, against the defendant Roger W. Willing, charging general negligence, operating at a speed greater than reasonable and proper, and which endangered persons and property in and upon the highway, not keeping a proper lookout, not giving audible warning with a horn or other device, driving on the left half of the road, and causing his car to collide with the car driven by the plaintiff Reinert when such could have been avoided by reasonable care by the defendant Willing, alleging due care by the plaintiff, and alleging as a proximate result of the defendant's negligence various personal injuries; Count II being the claim of another original plaintiff, Lou Anne Norton, another passenger in the Reinert car, against the defendant Willing, charging the same negligence; and Count III being a claim of another original plaintiff, Donna DeBoer, as owner of the Reinert car, against the defendant Willing, for damages to her car, charging the same negligence. Count I by the plaintiff David J. Reinert is the only matter involved in this appeal. The defendant's answer denied all alleged negligence and denied the exercise of due care by the plaintiff. The principal



injuries claimed by the plaintiff, as it developed in the evidence, were an aggravation and recurrence of an ulcer, which the plaintiff had previously had and from which he'd evidently recovered some few years before, the ultimate loss of certain teeth, for which he had to thereafter have a partial plate, some lacerations, and shock, and the plaintiff's claimed out-of-pocket expenses were about \$800.00.

In the two consolidated cases, REINERT et al. v. WILLING, the present case, and KASTEN v. WILLING et al., the other case, there were, in addition to the verdict and judgment for the plaintiff, David J. Reinert, for \$10,000.00, which is involved on this appeal, a verdict and judgment in favor of the plaintiff DeBoer in the sum of \$225.00, a verdict and judgment in favor of the plaintiff Lou Anne Norton in the sum of \$400.00, and a verdict and judgment in favor of the plaintiff, David Kasten, for \$25,000.00, all against the defendant Willing. Those other judgments have been satisfied and are not at all involved here. David J. Reinert, the remaining plaintiff in the present suit, who was also one of the defendants in the other case, KASTEN v. WILLING et al., was found not guilty as to the claim of the plaintiff David Kasten in that other suit.

The defendant-appellant, Roger W. Willing, urges these claimed errors: (1) the consolidation of the two cases for trial; (2) the giving of certain instructions offered by Reinert; (3) improper and prejudicial evidence admitted by the Court; and (4) prejudicial and improper arguments made by counsel for the plaintiff Reinert here and counsel for the plaintiff Kasten in KASTEN v. WILLING et al.

As to the consolidation for trial of the two cases, REINERT et al. v. WILLING, this suit, and KASTEN v. WILLING et al.,



the other suit, the only references we can find on that in the abstract or additional abstract are that on February 19, 1954, on a hearing of Reinert's motion to consolidate, and after arguments, an order was entered reserving the ruling until the time of pre-trial, and then on October 3, 1955, there was an order entered consolidating the cases for the purposes of trial. There is nothing in those references to indicate any objection made at the time by the defendant Willing to the proposed consolidation. Although he says in his brief that this was over his objection he does not point out any place in the abstract or record where such objection is noted, and we will not search the record for alleged error. Nor does he refer us to any cases on the point. Under CH. 110, ILL. REV. STATS., 1955, par. 51, actions pending in the same court may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right. This is a matter resting largely in the sound judicial discretion of the trial court: OSWALD v. GRAND TRUNK etc. RY. CO. (1935) 283 Ill. App. 86; IRMEGAR et al. v. COUNTY OF TAZEWELL (1914) 264 Ill. 172; Cf. BLACK HAWK MOTOR TRANSIT CO. v. ILL. C. C. et al. (1943) 383 Ill. 57; BARNES v. SWEDISH etc. BANK etc. et al. (1939) 371 Ill. 20. We perceive no abuse of judicial discretion in the order of consolidation for trial. But that, of course, does not change the fundamental rights of the parties, or the applicable substantive or procedural law, or the rules of evidence, or the rules as to instructions. And, after consolidation for trial, the causes must, as always, be conducted in such a way as to avoid prejudice to the substantial rights of the parties.

The plaintiff Reinert testified substantially as follows, so far as now material: he, Reinert, with his two passengers, Kasten and Norton, in the back seat, was driving his sister's





DeSoto automobile, which was in good mechanical condition, in a northerly direction, with his lights on, about 11:30 p.m., about 35 m.p.h., his speed decreasing, on Hopps Road, in the east lane of traffic, going up the south side of a hill. He had travelled it before, knew the type of road it was, the surface was flat, but the road was hilly. At one point he said he did not recall whether he was travelling in the center or not. He saw the defendant Willing's car lights (that is all he could see) as it approached from the north 50 to 100 feet away as it came to the crest of the hill. He estimated, in the moment he had for observation, that Willing's speed was 65 m.p.h. The Willing car, he said, was in Reinert's east or north bound lane and directly in front of him. Reinert cranked his steering wheel to the right, though he did not recall his car changing direction, and immediately, not more than a second after he'd seen Willing's lights, the impact of the two automobiles took place, about 50 feet south of the crest. There was no center line marked in the road. It was a cold, dry night, with no ice or snow. He did not blow his horn. There is more than enough room for two cars to pass on the highway. The next day he observed a greasy spot on the road about 3 feet in from the east shoulder in front of where his car had stopped after the collision, about 50 feet south of the crest.

One passenger in the Reinert car, Kasten, contradicted Reinert, to some extent, testifying that just before the collision the Reinert car was about 1 foot or so over, or west, of the center of the road. He also said Reinert swerved to the right, the defendant Willing's car was partly, but not entirely, in the northbound lane, and the collision occurred in the northbound lane. Kasten was riding in the rear seat of the Reinert car, on the right, or



east, or outside side. Kasten said the Reinert car, at the time of the impact, was completely in the east or northbound lane of traffic. He saw the lights of the Willing car coming right at them. He could not, however, he said, see the road, - he was lying down at the time. He had no opinion as to Willing's speed. The other passenger, Norton, who was also in the back seat, at first said that Reinert was on the right side of the road in the direction he was going, and was going about 35 m.p.h., but she then later said the first thing she remembers is the impact, she did not see the other car before, and she does not know how fast, or on what part of the road, Reinert was driving.

The defendant Willing testified, substantially, so far as now material, that he was travelling 40 to 45 m.p.h., about, as he reached the top of the hill, proceeding southerly, that the Reinert car, proceeding northerly, was straddling the center (or he believes it was) when he first saw it, some 5 or 6 feet away, (he having seen its lights a few more feet away), he did not sound his horn, or apply his brakes, he had driven the road a few times before and knew he couldn't see a car until he practically reached the top of the hill, and he, himself, as he came up the hill and at the top of the hill might have been a foot or so over the center but not much farther, the road was about 18 feet wide at the crest of the hill, there was no center line, he did not see Reinert swerve to the right, and the Willing car was in good operating condition.

There were three passengers in the Willing car, McDaniel, Gance, and Johnson. McDaniel's testimony was of no particular significance. Gance, who was in the front seat, testified that the Willing car was on the right side of the road travelling south, going about 35-40 m.p.h., that the collision occurred south of the



crest of the hill, and she did not see the other car before the collision. Johnson, who was in the back seat, testified that the road was a narrow blacktop, about 12½ ft. wide at the crest of the hill, with loose gravel extending to the sides, and with a raised center. Willing was going about 40 m.p.h., on the right hand side of the road, the headlights of the Reinert car were directly in front, it was on the wrong side ("our" side) of the road, past the center, - that's where the Reinert lights were, but he could not see the car, though in a statement a few days after the collision he'd said he did not know whether Willing was on the wrong side of the road or Reinert was on the wrong side.

The cars were about 120 feet or so apart after the collision, the Reinert car being partly on the east shoulder and partly on the east side of the road, and the Willing car being substantially in the middle of the road facing south eastwardly. There was, according to the witness, Paul Ellison, a State Policeman, at the scene afterwards, some scattered debris in the north-bound lane close to the center of the road, (one or more other witnesses placing the debris, however, more in the center of the highway, others more to the east), about 50 feet south of the crest of the hill, to the left front of where the Reinert car was stopped after the impact.

We will not attempt to summarize the rest of the evidence offered by the plaintiff and the defendant, of which there was considerable, including that of Paul Ellison, a State Policeman, at the scene afterwards, Gladys Marshall and Albert Marshall, passersby, at the scene afterwards, a number of photographs, a great deal of medical and dental testimony, some other evidence relating to claimed damages, and Carl Weier and Donald Prochazka, also passersby, at the scene afterwards. Enough has been set forth to say that



we believe, had the jury been properly instructed, and there were no other material error, there was an issue of fact on which they could properly have found for the plaintiff, but the evidence as to liability, claimed negligence of Willing, and claimed contributory negligence or freedom therefrom of Reinert, was closely and sharply contested, and it was particularly important and necessary, under these circumstances, that the instructions be accurate and not have a tendency to mislead the jury: CITY OF CHICAGO v. BUTTON etc. (1907) 136 Ill. App. 221; BURKE v. ZWICK (1939) 299 Ill. App. 558; SHARP v. BROWN (1953) 349 Ill. App. 269.

None of the instructions offered by Reinert, the remaining plaintiff in this suit and a defendant in the other suit, and given, were limited or made applicable solely to the present suit, or solely to the other suit, and it must be remembered that the other suit of Kasten against Willing and Reinert was, by consolidation for trial on Reinert's motion, being tried at the same time, involving the same automobiles, and the same essential facts, but with a different plaintiff, and with Reinert being a defendant (with Willing) there but a plaintiff here. The complaint here in this suit had allegations of negligence against the defendant Willing and freedom from contributory negligence by the plaintiff Reinert. The complaint in the other suit by Kasten necessarily had to charge Reinert with wilful and wanton misconduct, and negligence against Willing.

One of the instructions offered and given on behalf of Reinert, a defendant in the other suit and a plaintiff here in this suit, was as follows:

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4. The following are the names of the persons who have been appointed to the various positions in the organization:

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*Journal of Management Studies*, 36(7), 809–826.

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"The Court instructs the jury that there was in full force and effect, at the time of the accident in question on February 23, 1953, a Statute of the State of Illinois, which provides as follows:

That no person riding in a motor vehicle as a guest, without payment for such ride ... shall have a cause of action for damages against the driver or operator of such motor vehicle ... unless such accident shall have been caused by the wilful and wanton misconduct of the driver or operator of such motor vehicle ... and unless such wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought.

You are further instructed that, if under the preponderance of the evidence and the instructions of the Court, that you find the defendant, David J. Reinert, was not guilty of wilful and wanton misconduct in the operation of his motor vehicle just before and at the time of the collision, then you should find the defendant, David J. Reinert, not guilty."

David J. Reinert, being the driver or operator of the northbound vehicle, and Kasten being a guest therein, an instruction of that general type, under CH. 95 1/2 ILL. REV. STATS., 1955, par. 58a, would have not been improper in, but only in, and only applicable to the other suit of KASTEN v. WILLING and REINERT, in which Reinert was one of the defendants, and only applicable to Kasten's claim against Reinert. But that suit was being tried not by itself but, upon consolidation on Reinert's motion, with this present suit of REINERT et al. v. WILLING, in which Reinert was one (and the only now remaining) plaintiff. Such an instruction, of course, would not, as an independent matter, have been proper in, and was wholly inapplicable and unrelated to, this present suit and the issues herein. Reinert's freedom from, or guilt of, contributory negligence was an important, closely contested, issue in this present suit on which the evidence was conflicting in some material respects. His alleged

The Court further held that the Government's failure to disclose the existence of the "Black Book" was a material omission which constituted perjury.

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wilful and wanton conduct, or the absence thereof, had nothing to do with that issue or with this present suit, however important it was in the other suit. To tell the jury, without making it strictly and clearly applicable only to the other case of KASTEN v. WILLING et al., and only to Kasten's claim against Reinert, that if Reinert was not guilty of wilful and wanton misconduct then he should be found not guilty, and to let the jury determine, without further guidance, how and to which suit and with or without what limitations the instruction shall be applied, was, under the particular circumstances here presented, erroneous, misleading and prejudicial to the defendant Willing in the present suit. The jury might well have obtained the impression and believed (though erroneously, of course) that unless David J. Reinert in his capacity as a defendant in the other suit was guilty of wilful and wanton misconduct he should be found not guilty of contributory negligence in his capacity as a plaintiff in this present suit, and if not guilty of wilful and wanton misconduct there he was not guilty of contributory negligence here. He could, of course, have been not guilty of wilful and wanton misconduct as a defendant in the other suit and yet have been guilty of contributory negligence as a plaintiff in this present suit, negligence and wilful and wanton conduct being two different things. But the distinction between the two things is not always understood by an average jury and neither this or any other instruction endeavored to explain the difference or the inapplicability of the jury's finding on the issue of Reinert's claimed wilful and wanton conduct there to the issue of Reinert's claimed contributory negligence here: BEZEMEK v. PANICO et al., (1939) 301 Ill. App. 408. The plaintiff refers us to no case where such an instruc-



tion has been given and approved under similar circumstances.

The following four additional instructions were also given, as requested by the plaintiff Reinert:

"On the date of the collision there was in full force and effect and operation a certain Statute of the State of Illinois, which provided and provides, among other things, that every motor vehicle, when operated upon a highway shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than 200 feet and that the driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn."

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"You are instructed that the statutes of the State of Illinois imposes no restrictions on the rate of speed by miles per hour of motor vehicles outside the limits of any city, village, or incorporated town, but provides that no person driving a vehicle on any public highway in the State, shall do so at a speed greater than is reasonable and proper, having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person."

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"The Court instructs the jury that there was in full force and effect and operation, a certain Statute in the State of Illinois, which provided and provides, among other things, as follows:

'Upon all roadways of sufficient width, a vehicle shall be driven upon the right half of the roadway.' "

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"The Court instructs the jury that there was in full force and effect in the State of Illinois at the time of the collision in question, a Statute which provided that no person shall drive a vehicle of the first division upon any public highway in this State, at a speed greater than is reasonable and proper, having regard to the traffic and use of the way, or so as to endanger the life or limb or injure the property of any person.

The Court further instructs the jury that the automobile driven by Roger W. Willing and the automobile driven by David J. Reinert at the time of the collision, involved herein, were vehicles of the first division."

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All of those refer to parts of the Uniform Act Regulating Traffic on Highways: CH. 95 $\frac{1}{2}$  ILL. REV. STATS., 1955, par. 98 ff. The first, relating to a horn, refers to CH. 95 $\frac{1}{2}$ , ILL. REV. STATS., 1955, par. 212. It omits a part of the statute to the effect that no horn shall emit an unreasonable loud or harsh sound, and a part thereof to the effect the driver shall not otherwise use such horn when upon a highway. We believe there was scant, if any, evidence that the defendant Willing's not sounding his horn was a proximate cause of the injuries here concerned or that doing so was reasonably necessary under the circumstances here to insure safe operation, to which the instruction could have been applicable. We consider it erroneous, however, primarily for other reasons, though the foregoing are factors to be given some consideration and strengthen our conclusion. The second and fourth, relating to speed, refer to CH. 95 $\frac{1}{2}$ , ILL. REV. STATS., 1955, par. 146. They are, in substance, repetitious and duplications, and if either was proper there was no necessity for the other. We believe there was scant credible evidence of an unreasonable and improper speed, under the circumstances, of the defendant Willing's car to which the instructions could have been applicable, though we would not be inclined to consider them erroneous or, at least, reversible error for that reason alone, but such is a factor to be considered and strengthens our conclusion when we believe, as we do, they are erroneous primarily for other reasons. The third, relating to driving on the right half of the road, refers to CH. 95 $\frac{1}{2}$ , ILL. REV. STATS., 1955, par. 151, but fails to refer to par. 152, immediately following, relating to passing vehicles proceeding in opposite directions, which would seem to be equally apposite, to the effect that drivers of vehicles proceeding in opposite directions, except as provided in par. 151, shall pass





each other to the right and upon roadways having width for not more than one line of traffic in each direction each driver shall give to the other at least one-half of the main travelled portion of the roadway as nearly as possible.

Under CH. 110, ILL. REV. STATS., 1955, par. 67, the Court shall give instructions to the jury only as to the law of the case. Their object is to give information to the jury concerning the law of the case, applicable to the facts of the case, for immediate application to the subject matter before the jury: HEMPHILL, Ill. Jury Inst., Vol. 1, p. 107. A purely abstract statement of law in an instruction, even if theoretically correct, and applicable to the facts, is error if it has a tendency to mislead, and the Court may properly conclude such an instruction did have a tendency to mislead in a case where the jury had sharply conflicting evidence to weigh. It is the function of instructions to give to the jury rules of law which are applicable to the evidence, and to make the application so that the jury may understand the relation of the rules to the evidence: MAYER v. SPRINGER (1901) 192 Ill. 270; DOWNEY et al v. PALMER et al. (1919) 287 Ill. 42; BURKE v. ZWICK, supra; HEMPHILL, Ill. Jury Inst., Vol. 1, p. 19 - 22.

Violations, by acts or omissions, of various parts of the Motor Vehicles Act, if proved, are not negligence (or contributory negligence) per se: BURKE v. ZWICK, supra; a mere failure to perform a statutory duty is not necessarily negligence, - it may be negligence if all the circumstances under which it occurs indicates a neglect of duty: BRACKETT etc. v. BUILDERS LUMBER CO. (1929) 253 Ill. App. 107; the violation of a statute, if proved, is only one of the facts and circumstances to be considered in determining whether the party is guilty of negligence, or contributory negligence, and,



in addition, if it be negligence or contributory negligence, such must be found to have proximately contributed to the injury, before it has any significance: MILLER v. BURCH (1929) 254 Ill. App. 387.

In BURKE v. ZWICK, supra, where the proof bearing upon liability was conflicting, and the matter was viewed as close upon the question of liability, an instruction relating to another section of the Motor Vehicles Act, in substantially similar form to the four above Reinert instructions given here, was held to be an abstract legal proposition, not by its terms made applicable to the facts, and, as such, liable to confuse the jury. In SEIMAN et al. v. MIDWEST HAULERS INC. et al. (1941) 309 Ill. App. 154, an instruction in the language of the statute of the regulations of the Motor Vehicle Act under the charges of negligence was held not to be erroneous where followed by instructions making application thereof to the facts in the case, - which was not done here. In WEVER v. STAGGS (1932) 264 Ill. App. 556, instructions quoting different sections of the statute under the Motor Vehicle Act as abstract propositions of law without applying them to the facts in the case were held to be erroneous, but not reversible error, where there was no conflict in the evidence as to the liability of the defendant and he could not have been harmed by the instructions, which are quite different circumstances than as are presented here. In BORST et al. v. LANGSDALE et al. (1955) 8 Ill. App. (2) 88, a case referred to by the plaintiff here, we found no objection to an instruction relating to driving on the right half of the road, - the subject dealt with by the third of the foregoing referred to instructions in this case, - because it clearly set out that the jury in order to hold the de-



ferdent guilty was required to find not only that he failed to stay on his half of the highway but also that such conduct, if any, was negligent, and directly caused the plaintiff's injuries, and the plaintiffs were using ordinary care at the time. Such is quite in contrast with the form of the foregoing instruction on that subject here given.

We are not unaware of other cases to the effect that an instruction reciting a portion of the Motor Vehicle statute is not erroneous, - because laying down the law in the words of the law itself ought not to be pronounced error: LATESTO v. BAKER et al. (1927) 246 Ill. App. 425; that an instruction merely stating a rule of law under the Motor Vehicle Act is not, in itself, ground for reversal: BARNSTABLE v. CALANDRO (1933) 270 Ill. App. 57; that the general rule is that ordinarily an instruction in the language of the statute may be regarded as sufficient where it cannot reasonably be said, because of the circumstances and other instructions, that the jury were misled: VAN MEETER v. GURNEY et al. (1926) 240 Ill. App. 165; and that an instruction stating the law in the language of the statute and applicable to the facts is not erroneous: COONEY v. HUGHES et al. (1941) 310 Ill. App. 371. But we believe them inapplicable to the particular circumstances of the case at bar.

Those four foregoing instructions here given are all purely abstract statements of law, and, under the particular circumstances here presented, have a tendency to mislead and confuse the jury, - whatever their consequences and effect may have been under other circumstances. Assuming the rules of law therein to be applicable to the evidence, the instructions do not make the application thereto. The jury may have erroneously concluded and inferred that the judge

Forrest Gump was born in 1946 and grew up in Mississippi. He was a brilliant student and a natural leader. He was also a natural athlete and was a member of the football team. He was a member of the ROTC and was a member of the National Student Reliance Council. He was a member of the National Student Reliance Council and was a member of the National Student Reliance Council.

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thought the facts stated therein on which the propositions were necessarily based had been proved. They inferentially imply that a conclusion of negligence follows or may follow therefrom, - the propositions merely hanging suspended, so to speak, for the jury to conjure about.

The defendant complains of certain other instructions but we do not believe it will be necessary for us to make any comment on them. Nor need we pass on the other claimed errors concerning allegedly improper and prejudicial evidence, and allegedly prejudicial and improper arguments of counsel. If there were error in any of those respects such will probably not recur on a new trial.

The judgment is reversed and the cause remanded for a new trial.

REVERSED and REMANDED.

Dove, P.J. Concurs

*Forvaldi E. Concur*





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individually is too narrow to permit its highest development for commercial or for residential purposes; together the two parcels permit the highest use of each. In the summer and fall of 1954 Riley requested counterplaintiff to sell parcel B in conjunction with a sale by Riley of parcel A, and represented to counterplaintiff that he, Riley, was unable to sell parcel A separate and apart from parcel B; following a request by Riley, he and defendant Haliday came to counterplaintiff's home and then and there represented to counterplaintiff that Haliday was a developer and builder with wide experience in residential subdivisions and interested in acquiring parcels A and B for subdivision and residential development; that Riley's sole position and interest in the transaction was that of a prospective vendor or seller of parcel A; that he and Haliday were dealing at arm's length with each other and their interests as seller and purchaser were the usual adverse interests of parties in such a transaction; that it would cost a great deal of money to develop either or both parcels, and he, Riley, did not have the money necessary for such a purpose; that Haliday had the money required; that Riley intended to sell parcel A and move to Arizona if counterplaintiff would agree to sell parcel B; that Riley had agreed to sell parcel A for \$12,500; that the final offer of Haliday to buy parcel B for \$20,000 was more for parcel B than the price of \$12,500 at which Riley had agreed to sell parcel A; that Riley knew of no

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one else willing to pay as much as Haliday's offer for parcel B or for both parcels together; each of the foregoing representations were false and untrue and known by Riley and Haliday at the time to be false and untrue; Haliday was in truth and fact acting as nominee for Riley in a scheme to corrupt a legitimate source of information of counterplaintiff, namely defendant Haliday, and to thereby induce counterplaintiff by false pretenses to sell parcel B at a price far below its actual value; in truth and fact Riley was not interested in and did not intend to sell parcel A to Haliday; Haliday was not a builder or developer and had never done such work, but was merely a nominee to acquire parcel B for Riley and was not interested in buying either parcel on his own account; Riley knew parcel B was worth at least four times \$20,000 by reason of negotiations he was then conducting to sell parcels A and B to others than Haliday; Riley's only interest and position in the transaction was that of purchaser of parcel B from counterplaintiff, not that of vendor of parcel A; Riley was in collaboration with Haliday and not dealing at arm's length with him; Riley had no intent to sell or grant Haliday a bona fide option to buy parcel A for \$12,500, nor to move to Arizona; counterplaintiff was uninformed as to the true value of parcel B and had no knowledge as to its worth; believing Riley to be interested only in selling parcel A, and in reliance upon the false representations and pretenses



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of defendants, counterplaintiff executed an option in favor of Haliday granting Haliday the right to purchase parcel B for \$20,000, a price which counterplaintiff, believing and relying on defendants' false representations set forth above, then thought represented the true value of the property, but which price was in truth far below the true value of parcel B. In February 1955, while counterplaintiff was in Florida, Haliday exercised the option and purchased parcel B from counterplaintiff at a price of \$20,000; the sale of parcel B through Haliday to Riley was completed for counterplaintiff by his attorneys while counterplaintiff was still in Florida, at which time counterplaintiff still had no knowledge or information as to the full and true value of parcel B, of the true relationship between Haliday and Riley, or of the falsity of any of the other representations made to him by Riley and Haliday. By means of the foregoing fraudulent scheme and misrepresentations, Riley and Haliday have obtained parcel B at a price far below its actual value, and almost immediately thereafter resold the same for Riley's benefit at a profit exceeding \$50,000; by reason of the foregoing scheme and pretenses and fraud, counterplaintiff was induced to forego an independent investigation of the true value of parcel B, and did not at or near the time of granting the aforesaid option to Haliday obtain an independent appraisal of its value; had counterplaintiff been aware of the true positions and interests of both Riley and Haliday in the trans-



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action, and of the falsity of their other pretenses, counterplaintiff would not have granted the option to Haliday, would not have sold parcel B to Haliday at the option or any other price, and would not have dealt with either Riley or Haliday without first making an independent investigation of the value of the property and obtaining an independent appraisal of its value, by reason whereof counterplaintiff has been injured in the amount of \$50,000.

Defendants' theory is that the relation of counterplaintiff and defendants was "an ordinary buyer-seller relationship governed by the rules of caveat emptor and caveat vender, and any expressions of opinion as to value are not only permissible but neither party relied thereon, nor did they have the right to rely thereon nor are such expressions of opinion as to value actionable." The representations of defendants to counterplaintiff were not merely an expression of opinion as to the value of counterplaintiff's property, but a misrepresentation of facts alleged to be false and relied upon by counterplaintiff. They were designed to mislead counterplaintiff as to the true value of his property and to deter him from making an independent investigation as to such value. Haliday falsely posed as, and was falsely represented by Riley to be a contractor and subdivider, dealing at arm's length with Riley and buying parcel B at a price substantially in excess of the price claimed as the selling price of

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parcel A, whereas in truth and fact Haliday was the nominee of Riley, purchasing parcel B for him, to be thereafter sold for the benefit of Riley and at a profit to him of \$50,000. This is actionable fraud. Kenner v. Harding, 85 Ill. 264, Schwarz v. Reznick, 257 Ill. 479. Having made the false representations for the purpose of inducing counterplaintiff to act thereon, defendants cannot now contend that counterplaintiff was not sufficiently careful to discover the fraud perpetrated by defendants and prevent its accomplishment. Roda v. Berko, 401 Ill. 335.

The order appealed from is reversed and the cause is remanded to the trial court for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

BURKE AND FRIEND, JJ., CONCUR.

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FRANCES SUCHER,

Appellee,

v.

JOSEF NABENKOEGL, JR., Executor  
of the Estate of JOSEPH RIBICH,  
Deceased,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

13 I.A.<sup>2d</sup> 248

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Joseph Ribich, herein called defendant, appealed from an order denying his motion to open a judgment by confession for \$4,375 and costs entered on a promissory note for \$3,900 payable to the order of plaintiff, a sister of defendant's deceased wife.

The note was executed July 25, 1955; judgment was confessed September 20, 1955; on October 18, 1955 defendant filed his written motion, supported by his affidavit, to open the judgment. In the affidavit defendant states that his wife died July 20, 1955; that shortly before her death and at a time when she was incompetent mentally to execute a will, she executed a will in which she made a bequest of \$5,000 to plaintiff, her sister; that the will was made at the insistence of plaintiff and her two daughters; that defendant is 85 years of age, and two days after the funeral of his wife, while he was still mourning her loss, plaintiff and another person, whom defendant did not know and whom he assumed was a friend, but who in fact was an attorney, came to defendant's home;

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that the daughters of plaintiff delivered to defendant the alleged will of his deceased wife and stated that he, defendant, should pay to them, for their mother, the bequest of \$5,000 made in the will; that they, the daughters, would accompany him to the bank to withdraw the fund to be delivered by them to their mother; that defendant refused to go with them to the bank and the daughters then and there stated that defendant should execute a document then presented to him by the lawyer as evidence of his obligation, because the will of defendant's wife so stated; that defendant refused to sign the document presented, but after receiving assurances from the daughters and the lawyer, and having been told that he was legally obligated to sign the document, and believing the representations made to him, defendant signed the document; that he did not know of the nature of the document at the time he signed it, and was fraudulently and improperly induced to execute the note in the principal sum of \$3,900 upon which judgment was entered; that he did not know and was not told that the will of his wife would not be effective even if properly executed and even if testatrix was of sound mind, because of the fact that decedent's property was held in joint tenancy with affiant and would therefore become defendant's as her sole surviving spouse; that defendant was not indebted to plaintiff in any sum whatever, nor did he receive anything of value at the time of the execution and delivery of said note or at any time prior to or subsequent to its execution and delivery; that no good or valuable consideration existed



-3-

for the note; that by reason of the advanced age and mental condition of affiant, plaintiff and her representatives were enabled to exercise undue influence over him and to procure the execution of the note by fraudulent inducement, duress and undue influence; that in consequence the note is void and of no legal force or effect.

On November 7, 1955 counteraffidavits of plaintiff, her two daughters and the attorney who accompanied the daughters to defendant's home, and the unsworn statement of a friend who was present when the note was signed, were filed by plaintiff. The allegations in these affidavits and the unsworn statement tended to exculpate plaintiff, her daughters and the lawyer from the charges of fraudulent inducement, duress and undue influence made in defendant's affidavit, and to show that defendant voluntarily executed the note in fulfillment of his deceased wife's intention to give something to plaintiff for what plaintiff had done in taking care of defendant's wife.

On May 29, 1956, on defendant's motion for a hearing on his motion to vacate, a hearing was had and an order entered that "the court having considered the affidavit in support of such motion, and counter-affidavits filed herein, \* \* \* It is therefore ordered that the motion to open (the) judgment be and is hereby denied." Defendant perfected his appeal. Thereafter he died and the executor of his estate was substituted as defendant and appellant herein. We shall continue to refer to Ribich as defendant.

The following information was obtained from the records of the [redacted] Department of the Interior, Bureau of Land Management, regarding the [redacted] land grant.

[The remainder of the page contains extremely faint, illegible text.]



The opening of this judgment is controlled by former Rule 26 of the Supreme court, in force when the motion was filed. This rule, so far as it is pertinent here, is as follows:

"A motion to open a judgment by confession shall be supported by affidavit in the manner provided by rule 15 for summary judgments, and if the motion and affidavit discloses a prima facie defense on the merits to the whole or a part of the plaintiff's demand, the court shall set such motion down for hearing. The plaintiff may file counter affidavits. If, at the hearing upon such motion, it shall appear that the defendant has a defense on the merits to the whole or a part of the plaintiff's demand and that he has been diligent in presenting his motion to open such judgment, the court shall then sustain the motion either as to the whole of the judgment or as to such part thereof as to which a good defense has been shown \*\*\*."

The purpose of the Supreme court in adopting this rule was to clarify and simplify the established practice, and not to change it so that cases could be tried by affidavits. Walrus Mfg. Co. v. Wilcox, 303 Ill. App. 286. In speaking of the practice prior to the adoption of Rule 26 the court said:

"\*\*\* it was the well-established practice that on a motion to open up a judgment entered by confession, the only question properly before the court was whether the defendant had set up a meritorious defense, and whether defendant was chargeable with such a degree of negligence as to leave him no standing in court. Elaborated Ready Roofing Co. v. Hunter, 262 Ill. App. 380. \*\*\* Counter-affidavits going to the merits of the defense were not admissible. Continental Const. Co. v. Henderson County Public Service Co., 227 Ill. App. 43."

See also Stranak v. Tomasovic, 309 Ill. App. 177; Kolmar, Inc. v. Moore, 323 Ill. App. 323.

Plaintiff does not disagree with the holdings in these cases. She insists that notwithstanding the recital



in the order appealed from that the court considered the counteraffidavits, the court did not in fact consider them. This contention is untenable. The recital in the order prevails. Plaintiff concedes that the defendant has been diligent in moving to vacate the judgment. She seeks to sustain the order of the court on the theory, as stated by her, "that the trial court properly denied the motion to open up the judgment in the exercise of its sound discretion because the motion and affidavit presented did not comply with Supreme Court Rule 26 and Supreme Court Rule 15 incorporated therein."

In permitting defendant to file his motion to open the judgment, granting leave to plaintiff to file counter-affidavits, and ordering that the motion be set for hearing on notice of either party, the trial court, impliedly at least, determined that the motion and affidavit disclosed a prima facie defense on the merits, as required by Rule 26. Plaintiff did not attack the sufficiency of the affidavit and its compliance with Rule 15 in the trial court, and cannot raise that objection for the first time on appeal. Kent v. Rhomberg, 288 Ill. App. 328; Becker v. Ketter, 323 Ill. App. 656.

Defendant's right to the opening of the judgment need not rest on a technical ground. The affidavit filed properly discloses a valid defense on the merits to the whole of plaintiff's demand. We mention only the defense of want of consideration. The note being without consideration,



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it could not be effective as an executed gift, as suggested in the counteraffidavits. A note intended purely as a gift to the payee is merely a promise to make a gift in the future, and is not an executed gift until the note is paid. Meyer v. Meyer, 379 Ill. 97. The court erred in denying defendant's motion.

The order is reversed and the cause remanded with directions to open the judgment and proceed in conformity with this opinion.

REVERSED AND REMANDED  
WITH DIRECTIONS.

BURKE, AND FRIEND, JJ. CONCUR



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AFFILIATED DISTILLERS BRANDS  
CORP., a corporation,

Plaintiff-Counterdefendant-Appellee,

v.

GOLD SEAL LIQUORS, INC., a corporation,

Defendant-Counterclaimant-Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO

13 I.A.<sup>2d</sup> 249

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

Affiliated Distillers Brands Corp., filed a statement of claim in the Municipal Court of Chicago against Gold Seal Liquors, Inc. Count I, as amended is based upon 92 Trade Acceptances payable to the order of plaintiff, all in identical form, except for the date and amount, for the aggregate sum of \$1,129,169.50. They bear various dates from October 30, 1954, to November 21, 1955. Each of the Trade Acceptances matured 30 days after the date of issuance and provided that "the transaction which gives rise to this instrument is the purchase of goods by the Acceptor from the Drawer." The statement of claim alleged that each was accepted by the defendant and delivered to the plaintiff; that plaintiff is the holder and owner of all the acceptances; that no payments have been made thereon; and that the acceptances remain unpaid. Count II, as amended, is based upon a claim for liquors, wines and other beverages sold and delivered to the defendant at its request in the amount of \$23,999.98. Count III is based upon an alleged breach of defendant's promise as a

1. The first part of the document is a list of names and addresses. The names are written in a cursive hand, and the addresses are written in a more formal, printed hand. The list is organized into three columns, with names in the first column and addresses in the second and third columns. The names are: John Smith, James Brown, William Jones, Robert White, Thomas Green, Charles Black, Henry Grey, George Baker, Edward King, and Benjamin Hill. The addresses are: 123 Main Street, New York, NY; 456 Elm Street, Boston, MA; 789 Oak Street, Philadelphia, PA; 101 Pine Street, Washington, DC; 202 Cedar Street, Baltimore, MD; 303 Birch Street, San Francisco, CA; 404 Spruce Street, Portland, ME; 505 Fir Street, Seattle, WA; 606 Redwood Street, Los Angeles, CA; and 707 Cypress Street, Miami, FL.

2. The second part of the document is a list of names and addresses, similar to the first part. The names are: David Lee, John Doe, Jane Doe, John Doe, Jane Doe, John Doe, Jane Doe, John Doe, Jane Doe, and John Doe. The addresses are: 808 Maple Street, New York, NY; 909 Elm Street, Boston, MA; 1010 Oak Street, Philadelphia, PA; 1111 Pine Street, Washington, DC; 1212 Cedar Street, Baltimore, MD; 1313 Birch Street, San Francisco, CA; 1414 Spruce Street, Portland, ME; 1515 Fir Street, Seattle, WA; 1616 Redwood Street, Los Angeles, CA; and 1717 Cypress Street, Miami, FL.

3. The third part of the document is a list of names and addresses, similar to the first two parts. The names are: John Doe, Jane Doe, John Doe, Jane Doe, John Doe, Jane Doe, John Doe, Jane Doe, John Doe, Jane Doe, and John Doe. The addresses are: 1818 Maple Street, New York, NY; 1919 Elm Street, Boston, MA; 2020 Oak Street, Philadelphia, PA; 2121 Pine Street, Washington, DC; 2222 Cedar Street, Baltimore, MD; 2323 Birch Street, San Francisco, CA; 2424 Spruce Street, Portland, ME; 2525 Fir Street, Seattle, WA; 2626 Redwood Street, Los Angeles, CA; and 2727 Cypress Street, Miami, FL.



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distributor to use its best efforts to sell and to promote plaintiff's products during such time as defendant acted as a distributor of the products.

Defendant filed an answer and a counterclaim and made a jury demand. The answer, as amended, admitted that it accepted the acceptances on the dates they bore and delivered them to the plaintiff and admitted the provision of each acceptance that the transaction was a purchase of goods by the acceptor from the drawer. The defendant avers that "it is without knowledge or information sufficient to form a belief" as to whether plaintiff is the holder and owner of the acceptances and "demands strict proof thereof." It admits that it has not paid any of the acceptances. It denies that it owes any money to plaintiff because it is entitled to a credit in the amount of \$309,336.82 and for the reasons set forth in paragraphs 8, 9 and 10 of its answer, as amended. Paragraph 8 reads:

"8. Further answering the allegations of said Count I, states that it was agreed by and between the plaintiff and defendant on or about June 22, 1953 that \$500,000.00 of the amount represented by said Trade Acceptances was to be retained by defendant and never to be paid by defendant to plaintiff, and in consideration for such agreement by the plaintiff, defendant was to and did continue in business and until about October 19, 1955 act as a wholesale distributor of alcoholic beverages for and on behalf of plaintiff in the sale and distribution of plaintiff's products. Defendant, pursuant to said agreement, paid to plaintiffs \$500,000 between July 3, 1953 and October 23, 1953, which sum of \$500,000 had been represented by a note dated August 1, 1951, in favor of defendant. The sum of \$500,000 represented by said note was advanced to defendant by plaintiff on or about August 1, 1951. From and after July 3, 1953, defendant was not required to reduce the amount represented by Trade Acceptances below \$500,000."



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Defendant has not argued its defenses of  
and  
"commercial bribery" acquisition by plaintiff of an  
"interest" in defendant's business set out in paragraphs  
9 and 10 of the answer and has abandoned these defenses.  
Defendant answered plaintiff's Count II, as amended, by  
admitting that it purchased and received wines, liquors and  
beverages but that it was not indebted thereon by reason  
of the matters set forth in its answer to Count I. Defendant  
answered Count III (not involved in this appeal) by denying  
that it breached any obligations.

In Count I of its counterclaim defendant alleges  
a distributorship agreement between plaintiff and defendant  
in 1941 for an "indefinite period" pursuant to which defendant  
made certain expenditures. This count states that plaintiff,  
without good cause or prior notice, breached the contract  
by discontinuing defendant's franchise on October 19, 1955,  
and refused and persists in refusing to sell its products  
to the defendant and asks damages of \$450,000. Count II of  
the counterclaim charges plaintiff with participation with  
Joseph C. Fusco in inducing a breach of plaintiff's dis-  
tributorship contract and alleges damages of \$1,400,000.  
The court sustained plaintiff's motion to strike paragraphs  
8, 9 and 10 of defendant's answer, as amended, to Count I  
of plaintiff's statement of claim, as amended, and plaintiff's  
motion to dismiss the counterclaim and entered judgment  
in favor of plaintiff on Count I of the original statement  
of claim for \$792,377.06. The court retained jurisdiction



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with respect to a disputed principal balance of \$39,628.74 and interest claimed in Count I of the original statement of claim. Plaintiff filed a subsequent motion for an additional judgment on the Trade Acceptances and the statement of account. Thereupon the court entered an additional judgment in favor of plaintiff for \$76,492.22 and retained jurisdiction with respect to an additional disputed principal balance of \$10,534.37, plus interest. The original Trade Acceptances were tendered to the defendant's counsel in open court and the clerk in the presence of defendant's counsel, stamped and endorsed on each of the Acceptances a notation that judgment had been entered thereon. Defendant appeals from the judgments and orders.

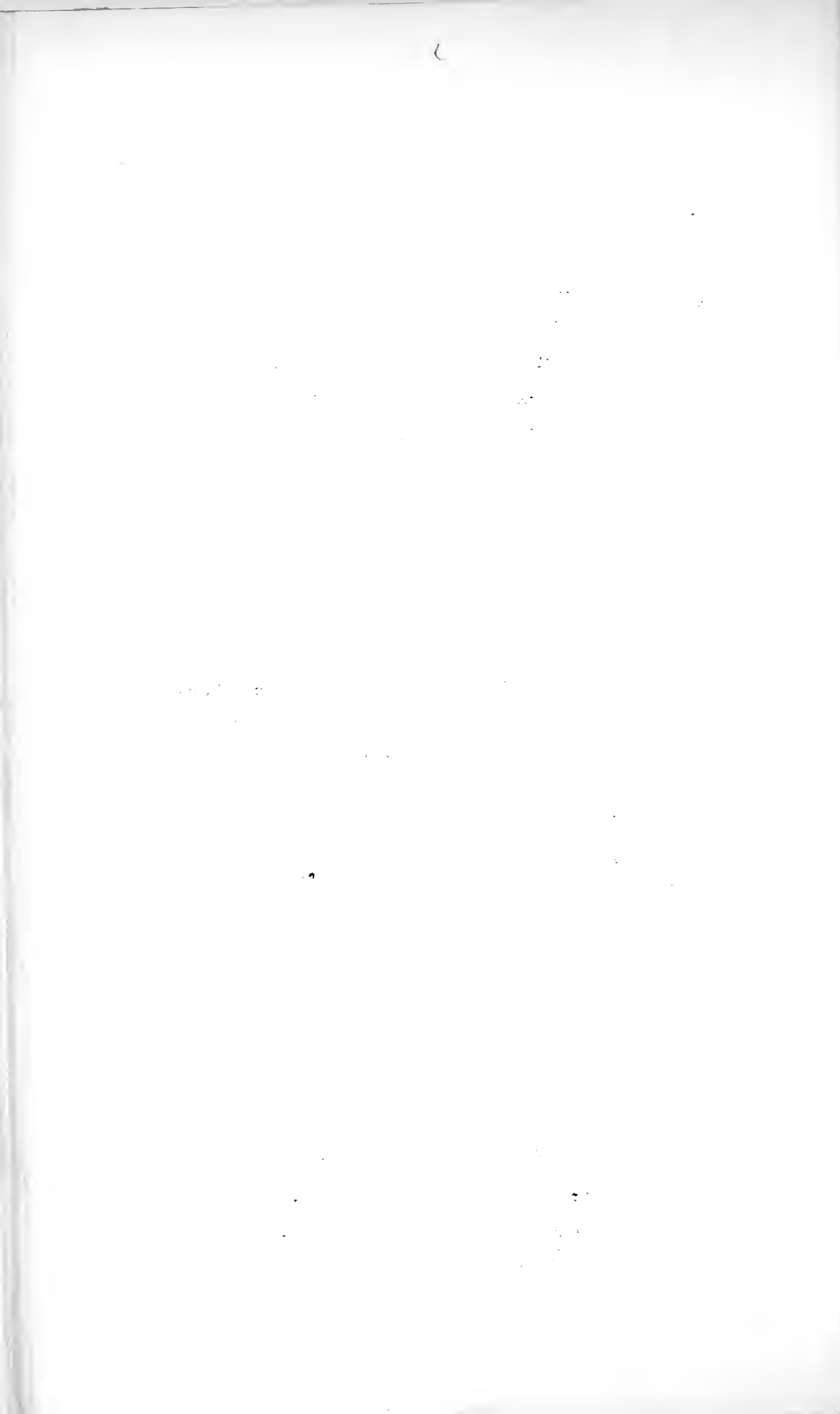
Defendant maintains that it was deprived of its right to a trial on the issue whether plaintiff was the "holder and owner" of the Trade Acceptances. The statement of claim alleges that the plaintiff is the holder and owner of the Trade Acceptances. The answer denies "knowledge or information sufficient to form a belief as to the truth" of the allegation. Defendant says that no "testimonial evidence" was offered as to the holding and ownership of the acceptances, nor that the documents presented in court were those from which the photostatic copies attached to the complaint were made. The possession of a note or other negotiable instrument by the payee is prima facie evidence of ownership. Elvin v. Wuchetich, 326 Ill. 285, 288; Spiller v. Riva, 278 Ill. App. 334, 340; Feulner v. Gillam, 216 Ill. App. 85, 90. The defendant admitted that plaintiff



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was the payee and that it delivered the acceptances to plaintiff. A mere averment by defendant of want of knowledge that plaintiff is the owner and holder of the acceptances without denying the facts which make plaintiff the owner and holder, is irrelevant and raises no issue of fact. We conclude that defendant's allegation that it was without information or knowledge sufficient to form a belief as to whether plaintiff was the holder and owner of the Trade Acceptances, but without denying the positive allegations of the statement of claim upon which the ownership was based, was ineffective to raise an issue of fact.

Defendant urges that neither the negotiable / instrument law nor the parol evidence rule bars defendant's proof of the allegations in paragraph 8 of its answer. Defendant cites Section 16 of the Negotiable Instruments Act (Par. 36, Par. 98, Ill. Rev. Stat. 1955) that "every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto" <sup>and that</sup> "as between immediate parties" and as regards a remote party other than a holder in due course, the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. It also relies on Section 58 of the Act (Par. 78) which provides that in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable. Defendant cites First National Bank of Granite City v. Draper, 266 Ill. App.





579; First National Bank of Harvey v. Trott et al., 236 Ill. App. 412; and Straus v. Citizens State Bank of Elmhurst, 164 Ill. App. 420, as authority for the admissibility of parol evidence of a collateral agreement that a person executing a negotiable instrument is not obligated to make payment. Defendant states that it is a well-established principle that parol evidence may be introduced to show that the delivery of a negotiable instrument is conditional upon the occurrence of certain future events and that such events have not occurred, citing Bell v. McDonald, 308 Ill. 329; Economy Fuse Co. v. Standard Electric Mfg. Co., 359 Ill. 504; and Fronek v. Wroblewski, 255 Ill. App. 529.

Defendant's answer admitted that each Trade Acceptance was genuine and valid; that there was independent consideration for each acceptance; that each had been accepted by it; and that defendant had delivered it to plaintiff. Defendant argues that the reasonable intentions of its allegations in paragraph 8 are that \$500,000 of Trade Acceptances were never to be paid in any event or that any future acceptances would not become operative and no payment would be necessary unless and until later acceptances in the amount of \$500,000 were issued. The defendant does not state any facts in paragraph 8 of its answer which show that the delivery of any Trade Acceptance was conditional or for a special purpose only and not for the purpose of transferring title to the acceptances. The defendant admitted that it "accepted and delivered" each of

THE STATE OF NEW YORK  
IN SENATE  
January 15, 1901.  
REPORT  
OF THE  
COMMISSIONERS OF THE LAND OFFICE  
IN RESPONSE TO A RESOLUTION  
PASSED BY THE SENATE  
MAY 1, 1899.  
ALBANY:  
J. B. LIPPINCOTT & CO.,  
PRINTERS.  
1901.

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the acceptances and made no averment that delivery was conditional or that title to the acceptances had not passed to the plaintiff. None of the acceptances was in existence at the time of the alleged oral agreement. The acceptances are written evidence of obligations to pay on dates certain. They were accepted by the defendant concurrently with the purchase of the merchandise, and the defendant as the purchaser delivered the acceptances to plaintiff as the seller. We are of the opinion that paragraph 8 of defendant's answer does not state a defense and that the trial judge was right in so holding.

Defendant asserts that Count I of its counterclaim states a good cause of action; that its distributorship contract does not lack mutuality; that the contract is terminable only upon reasonable notice; and that what constitutes reasonable notice is a question for the determination of the jury. Under the law of Illinois an oral agreement for an "indefinite period" is terminable at will. Joliet Bottling Co. v. Joliet Citizens' Brewing Co., 254 Ill. 215; First Mission Church v. Rockford Broadcasters, Inc., 324 Ill. App. 8; Gage v. Village of Wilmette, 315 Ill. 328. The counterclaim alleged that under the 1941 oral agreement the defendant was to have a distributorship to buy and sell products of the plaintiff for an "indefinite period," that it entered into performance and purchased products from the plaintiff and that the latter, without prior notice and without cause, discontinued the distributorship. It alleged that during the entire



period it was a licensed wholesale distributor of alcoholic beverages, engaged in the business of purchasing alcoholic beverages from others as well as from the plaintiff and in selling the beverages to retail outlets in Cook and Du Page Counties, Illinois.

Under the oral agreement the defendant was not bound to continue to act as a distributor for plaintiff or to purchase any of its products for any definite period of time, nor was the plaintiff required to sell its products to the defendant for any period of time. Neither party could require the other to continue the relationship any longer than agreeable to both. The defendant was not an exclusive distributor. It handled the products of other distillers. The allegations that it promised to and did buy plaintiff's products to maintain sufficient inventory warehouse facilities and sales organization, are incidents of its promise to use its best efforts to sell and promote plaintiff's products. Defendant does not make a claim for any damages upon orders received prior to the termination or that it was unable to fill any prior orders. We think that the cases cited by the defendant on this proposition are not applicable to the factual situation in the case at bar. We find that Count I of the counterclaim does not state a cause of action against the plaintiff.

Count II of defendant's counterclaim repeated the allegations of Count I that plaintiff breached its oral distributorship agreement. In addition it alleged that

2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 2682, 2683, 2684, 26

[illegible]

10. *Journal of the American Medical Association*, 1990; 263: 1001-1005.

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

1. *Chrysomelidae* (100%)

1990

The diagram illustrates the experimental design. It shows a sequence of events: a subject is presented with a stimulus (a face), then a response is recorded (a button press), and finally a feedback is provided (a light or sound). The sequence is repeated for multiple trials.

| Trial | Group A (%) | Group B (%) | Group C (%) | Group D (%) |
|-------|-------------|-------------|-------------|-------------|
| 1     | 65          | 75          | 75          | 75          |
| 2     | 70          | 65          | 65          | 65          |
| 3     | 75          | 75          | 75          | 75          |
| 4     | 80          | 80          | 80          | 80          |
| 5     | 85          | 85          | 85          | 85          |

•  $\frac{1}{2}$  = 0.5

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Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains. The number of transformed cells was determined by the number of colonies obtained on the selective medium. The results are the mean of three independent experiments.

17. 10. 1954. 10. 1954. 10. 1954.

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| Trial | Control | MCI | AD |
|-------|---------|-----|----|
| 1     | 85      | 75  | 65 |
| 2     | 88      | 78  | 68 |
| 3     | 90      | 80  | 70 |
| 4     | 92      | 82  | 72 |
| 5     | 95      | 85  | 75 |

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James C. Fusco had "maliciously, wilfully and with intent to destroy the business of Gold Seal, induced plaintiff to breach its contract with Gold Seal to the damage of counterclaimant in the amount of \$1,400,000." There are no allegations that plaintiff participated in inducing the breach. In Canister v. National Can Corp., 96 F. Sup. 273, the court said (274): "Under [New York] law, it appears an action for inducing a breach of contract will lie against a third party but a party to the contract itself cannot be held responsible for inducing himself to commit a breach of that contract \* \* \*." See Hein v. Chrysler Corp. 277 P. (2d) 708, 714; Loewenthal Securities Co. v. White Paving Co., 351 Ill. 285, 299. We are convinced that Count II of the counterclaim does not state a cause of action against the plaintiff. It is unnecessary to consider the further point urged by the plaintiff that the Municipal Court of Chicago does not have jurisdiction to determine Count II of the counterclaim.

For the reasons stated the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

NIEMEYER , P. J., and FRIEND, J., CONCUR.





437  
47008

BETTY DONOHO,

Appellee,

v.

O'CONNELL'S, INC., a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

13 I.A.<sup>2d</sup> 250

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

Betty Donoho sued O'Connell's, Inc., for damages because of personal injuries sustained when she fell in defendant's restaurant in Chicago on June 22, 1954. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at the sum of \$20,000. Judgment was entered on the verdict. Motions for judgment notwithstanding the verdict and for a new trial were denied. Defendant appeals.

The restaurant is located at 1112 Wilson Avenue, Chicago. It is on the north side of the street and immediately west of and adjacent to the station of the elevated railroad. There are two entrances to the restaurant. The Wilson Avenue entrance is in the south wall of the premises. There is also a double door in the east wall which leads into the Elevated Station. Both entrances are at the southeast corner of the building. There is a self-serving table where patrons stand and eat located immediately to the north of the "L" entrance. It is designated as a "stand-up" table. It is approximately 4 feet high, 24 inches across and about 3 feet in length.



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It extends lengthwise to the west from the east wall of the building so as to form a vestibule between the "L" doors, the Wilson Avenue entrance and the stand-up table. A grill is located in the south windows along the south wall and extends north about half the distance of and along the west wall. There is also a soda fountain along the north wall which extends to the rear from the north end of the grill. There is a counter in front of and to the east of the grill and a soda fountain which runs north and south parallel to the west wall. There is an aisle between the counter and the grill and soda fountain, which the counterman uses to serve patrons seated at the counter. There are eight stools for customers along this service counter. The entrance to the kitchen is at the north end of the aisle.

To the east of the counter and to the north and in line with the stand-up table there are three or four round tables. These tables are lower than the stand-up table and there are chairs around the tables to accommodate customers. The counterman serves the people seated at the counter while the customers at the round tables and at the stand-up table procure their food at the grill and take it to the tables for consumption. The floor of the premises is covered with a reddish maroon or gray marblelike substance. The entire premises were well lighted. There were lights all around the sides, behind the counter and a large chandelier in the center of the ceiling. There were also large lights in front



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of the reataurant which gave additional light to the premises from the outside.

The plaintiff was the only fact witness called in her behalf. She testified that she was a beauty operator, 56 years of age, and on June 22, 1954, was employed at a beauty shop in the vicinity. She left her place of employment at about 7:45 in the evening and walked to defendant's restaurant. It was daylight. She entered the restaurant from Wilson Avenue. There were about 15 customers in the restaurant at the time. When she entered there was a man standing at the south end of the stand-up table. She took the only vacant seat at the counter which was next to the last seat from the north end of the counter. She ordered a hamburger sandwich and a cup of coffee. There were people at all the round tables in back of her. The man at the stand-up table was eating a sandwich. He had a cup of coffee. He left shortly after the plaintiff entered. A few minutes after he left the bus boy removed the dishes from the stand-up table and cleaned it. Shortly after the plaintiff placed her order a second man took the first man's place at the stand-up table. He also brought a sandwich and a cup of coffee to the stand-up table. After the second man left there was no one using the stand-up table. The second man left about 10 or 15 minutes before the plaintiff started to leave. The plaintiff testified that shortly after the second man left she saw the bus boy collect the dishes and wipe off the table. She stated: "When the second



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man finished his meal at the stand-up table, I saw the bus boy clean the table. I saw him pick up the dishes. He swept in back and under the tables and counter but I didn't see him sweep in front." After the bus boy cleared the stand-up table plaintiff saw no one else around that table or the immediate vicinity thereof, and no one else used the entrance to the elevated station. She said that she was in the restaurant approximately 30 minutes and was seated at the counter for some 15 minutes after the second man left the stand-up table. She testified that "when I entered as far as I could see the floor of the restaurant was clean" and that she "Didn't see any foreign matter on the floor, it looked pretty clean to me." She had been in the restaurant many times previously and from her experience "knew that they kept the floor pretty clean" and that "she saw them sweep the floor at least once on every previous occasion when she was in the restaurant."

On direct examination, she testified: "When I was ready to go I got up and glanced at the floor. Then I started to walk to the south. At this time I was glancing at the floor and at the counterboy. As I started out of the restaurant I was going south and I saw the people at the table. I walked approximately 10 to 15 feet south before I changed my direction. I was going to leave by way of the elevated station. I went past the stand-up table and when I made my turn I started to walk to the east which would be to my left. I took about two steps before anything unusual happened. \* \* \* As I turned toward the east

The first thing I noticed when I stepped out of the car  
 was the cold. It was a sharp, biting cold that  
 seemed to penetrate my coat. I shivered as I  
 walked towards the building. The air was thick with  
 the scent of coal and the sound of distant  
 machinery. I had heard that the place was  
 a hellscape, but I didn't realize it would be  
 so cold. The workers I saw were bundled in  
 heavy coats, their faces pale from the weather.  
 I followed them through a series of corridors  
 that seemed to go on forever. The walls were  
 made of rough-hewn stone, and the floor was  
 uneven and cold. The air was stale and  
 filled with the smell of sweat and oil. I  
 felt a sense of unease as I walked, a feeling  
 that I was being watched. The workers  
 looked at me with curiosity, but I didn't  
 know what to say. I was a stranger here,  
 a newcomer to this world of darkness and  
 toil. I had come here for a reason, but I  
 didn't know what it was. I was lost, and I  
 didn't know how to find my way out. The  
 corridors seemed to twist and turn, leading  
 me deeper into the heart of the mine. I  
 felt a sense of claustrophobia, a feeling that  
 I was trapped. The workers continued to  
 walk ahead of me, their footsteps echoing  
 in the silence. I followed them, trying to  
 keep up. The air grew colder as we went  
 deeper, and the walls seemed to close in  
 on me. I was alone, and I was scared. I  
 didn't know what was out there, and I  
 didn't know how to survive. I was a  
 stranger in a strange land, and I was  
 alone.



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to go to the elevated station, I was to the south of the stand-up table. I was about 2 feet from the south edge of it. I took about 2 steps in an easterly direction and I slipped on something and fell on my side forward. It was my left foot that slipped. I was looking straight ahead at the time. I was walking at an ordinary gait. The sole of my left shoe came in contact with something and I fell down. After I fell down I was facing south, that is my face was toward the south. My feet was to the west and my head was to the east. My head was about 16 inches from the door leading into the elevated station. I did not feel any pain right away, but I did not get up. I tried but I couldn't. A counterboy and a man that I later learned was a Mr. Miller came to my assistance. I did not know Miller before that time. I have not known him since. Mr. Miller and the counterboy picked me up and sat me in a chair. While I was seated in this chair, I observed a piece of grilled onion on the floor about the area where I had been. It was an onion ring about the size of a half dollar. It was more or less rolled up. It was smashed up. Just a part of it was smashed up. It was about 2 feet from the stand-up table. I also noticed a smear on the floor. It was about 10 inches long and about an inch wide. It looked like grease. It was dark."

Plaintiff testified that when her shoes were taken off at the hospital she noticed some greasy substance on the sole of her left shoe running from the center to the



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toe, about 3 inches long and about three quarters of an inch wide. She stated that she did not know where the onion ring came from, how long it had been on the floor, or how it got there. The first time she saw it was after she was seated in the chair. The onion ring was nearer to the stand-up table than to the other tables or the counter. When she first saw it she noticed that a part of it was smashed and a part of it wasn't. It was "Just an outside onion ring, like an onion that is sliced and the inside taken out, just the ring. I would say that about a half of an inch of the onion ring was not smashed. About half of it ~~was smashed~~ and half of it wasn't." On cross-examination, she testified that when she reached the front of the restaurant and made the turn to go to the left, she was looking east and could see the floor, but she did not see anything on the floor between the space where she made the turn and the "L" door. She said: "When I looked at this space, after I made the turn, I didn't see anything on the floor. I stepped with my right foot and then made a step with my left foot and then I fell. I fell either when I finished or was in the process of taking my second step. It was my left foot that caused me to fall. I fell on my left side. \* \* \* I laid there a couple of minutes before the two gentlemen came and picked me up. \* \* \* When I was lying on the floor, I did not know what caused me to fall and I did not see any debris on the floor after I fell while I <sup>still</sup> was lying on the floor." Plaintiff further testified that after she fell, she was on the floor "a couple of minutes" before the counterman and a Mr. Miller assisted her to the



chair, and that while she was lying on the floor and during the time they picked her up and placed her in the chair she "did not see anything on the floor" and that she was seated in the chair before she first saw the onion ring on the floor about 2 feet west of where she was sitting and at the same time she noticed "a slide mark made by the sole of my left shoe." This slide mark was about 2 feet to the east of the stand-up table and was made by the sole of her left shoe. The mark ran east to west. She said that while she was sitting on the chair and after she saw the onion ring on the floor, she talked to the counterwoman and asked him for a glass of water and that she "didn't say anything to him about seeing the onion ring or slide mark on the floor." She also testified that she did not say anything about seeing the onion ring or the slide mark on the floor, although other customers were walking in the immediate vicinity of where the onion ring was.

Daniel Lupi, a former employee of the defendant, testified for the latter that on the day of the mishap he was working in the restaurant as night manager and that he was ringing up cash in the register on the west wall when he heard a commotion and testified that he immediately came around to where plaintiff was lying; that one of the customers pulled a chair out and that plaintiff sat on the chair; that "we asked her if she was all right and she was kind of shaking her head"; that witness then examined the floor to see "what possibly made her fall" and that he "didn't see anything on the floor but a skid mark."

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[illegible]

| Trial | Control (n=10) | MCI (n=10) | AD (n=10) |
|-------|----------------|------------|-----------|
| 1     | 85             | 75         | 65        |
| 2     | 88             | 78         | 68        |
| 3     | 90             | 80         | 70        |
| 4     | 92             | 82         | 72        |
| 5     | 95             | 85         | 75        |

[illegible][illegible]

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Testifying as to his examination of the floor immediately after the plaintiff fell, this witness said: "I examined the floor in the area and I didn't see anything on the floor at all in the way of debris. All there was, was a skid mark which I believe was caused by her heel. There was no water on the floor. I didn't see any debris of any kind. I saw no napkins, cigarette butts, onion rings or anything of that nature. I examined the entire area between the stand-up table and Wilson Avenue and all I found was this skid mark. \* \* \* Mrs. Donoho was sitting in the chair while I was examining the area. I asked her how she was feeling and I called the police. Mrs. Donoho did not tell me how she fell or what she fell on." This witness described the skid mark as 2 or 3 inches in length and about one inch in width and running generally in an easterly and westerly direction, and stated that it was distinguished from the reddish or maroon floor covering in that the mark was "sort of black in color" and that the skid mark did not look like grease.

James Lawler, at the time of the trial employed at another of defendant's restaurants, testified that on the day of the occurrence he was employed at the Wilson Avenue restaurant as a "swing man"; that he waited on the plaintiff that evening; that she had a hamburger sandwich, a piece of pie and a cup of coffee; that at about 8:30 that evening he was on his lunch period in a small room behind the counter; that he had been there about 15 minutes when the counterman, Al Guthridge, called to him. He

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continued: "When he called me I came out and got a chair and helped her into the chair. \* \* \* A couple of customers helped me in getting Mrs. Donoho into the chair. \* \* \* The chair we put Mrs. Donoho in was right in front between the stand-up table and the front door leading out into the street. She was facing towards the Wilson Avenue door. \* \* \* I looked at the floor, while Mrs. Donoho was sitting in the chair. \* \* \* I inspected the entire area around there. There was a scar on the floor like a scuff mark between the front table and the door and the stand-up table. I would say the scar was a couple to three inches long. It was dark in color. There was no moisture, water or any substance such as coffee, tea or milk or anything like that around the scuff marks. I did not see any debris of any kind in that area. I looked in the area around where she had fallen and there was no debris at all there. There was no onion ring there. \* \* \* While I was looking around there Mrs. Donoho was right in the chair. She did not point to an onion ring and she did not say anything about any onion ring. \* \* \* Mrs. Donoho was in the chair until the police arrived and took her away, which was about 10 to 20 minutes after she had fallen." He examined the scuff mark on the floor and stated that it had the appearance of a mark caused by black rubber and that it was dry. He also stated that Ozzie Bass was the only bus boy on duty. He testified further as to the general procedure relative to keeping the floors of the restaurant clean; that the floors were



-10-

swept every hour and that the floor of the restaurant is  
mopped at least three times a day;<sup>and</sup> that he saw Ozzie sweep  
the floor about 15 minutes before the accident.

Al Guthridge, the counterman, testified that at the time of the occurrence he was employed as a counterman at the restaurant; that the first indication he had that plaintiff fell was when he was reaching down to pick up a tea pot; that he heard a commotion; that when he straightened up he saw her lying on the floor in front of the stand-up table; that he immediately ran to the back and told Mr. Lawler "that someone was lying on the floor there and he rushed out to help the lady to a chair"; that Ozzie was in the kitchen when witness went back to get Lawler; that plaintiff was assisted to her chair "by two gentlemen and Lawler"; and that the manager, Mr. Lupi, called the police, who arrived within 10 to 20 minutes. Testifying as to the condition of the floor immediately after the occurrence this witness said: "Afterwards I went out and looked at the floor and there were some markings like scuffings on the floor. The scuff marks were about a foot and a half south of the tables and about a foot and a half south of this stand-up 'upright' table, somewhat closer to the west end. The markings was about three feet long and about one half inch to an inch broad. \* \* \* The scuff mark was dry. \* \* \* I did not see any moisture, water, coffee, milk or any debris, food particles, onion rings or anything like that on the floor."



Ozzie Base, who, at the time of the trial was not employed by defendant, testified that at the time of the occurrence he was employed at the restaurant as a bus boy and dishwasher. He described his duties as that of "running the dishes through the machine and going out and 'busing' the dishes and cleaning the floor." He stated that on the day of the occurrence he mopped the entire floor about 3 o'clock in the afternoon; that he cleaned up the third round table about 10 minutes before the mishap; that he did not clean any of the other round tables or the stand-up table after that; that he swept the floor in the vestibule area about 15 minutes before the plaintiff fell; and that there was no other bus boy on duty at the time. He testified that at the time plaintiff fell he was in the kitchen; that when he heard the commotion he came out of the kitchen and saw plaintiff sitting in the chair facing the front door; that after she had been taken out he made an examination of the floor; that he did see any moisture, spilled milk, coffee, tea or food particles of any kind or any onion rings on the floor. In describing the method of cleaning the tables he stated that if there is anything left on the tables after he removes the dishes, he cleans it off with a wet towel and brushes anything left on the table into a tray, and that he also cleans up anything that might be on the floor such as napkins and food particles.

Martin May, a police officer who was assigned to a squadrol in the district, testified that about 8:35 P.M. on the day of the occurrence he received a radio call that a woman had fallen at the restaurant; that he arrived



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there within a few minutes; that on entering the restaurant he saw a lady seated about three feet from the entrance; that she was facing toward the south; and that he asked her if she was injured and she told him that she had hurt her hip and she asked him to take her to the Ravenswood Hospital. He and another policeman took her to the hospital. He testified that "we knew that she had fallen somewhere in the area where she was seated and we looked in that area to see whether there was anything to cause her to fall, such as debris, water marks and the like. We did not see anything unusual. As far as I could see the floor was all right. Neither Mrs. Donoho or anyone else pointed out any debris, food particles or anything like that which might have caused her to fall." Harry Schmidt, the police officer who accompanied Officer May, testified that as they entered the restaurant they noticed plaintiff sitting on a chair about 4 feet from the door; that they asked her what was wrong; and that she said she had fallen. He testified that he noticed the condition of the floor but that "he did not see anything unusual about the area on the floor where she fell" and that he "did not see any debris, food, water, milk, coffee or onion rings on the floor."

It will be observed that three of defendant's witnesses, Lupi, Lawler and Guthridge described a mark on the floor apparently corresponding in looks to that described by plaintiff. Lupi described the mark as running east and west and 2 or 3 inches long; Lawler described the mark as 2 or 3 inches long but thought it was on a diagonal; Guthridge





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described it as about 3 feet long and about one half to one inch broad. Police officers May and Schmidt and the bus boy, Ozzie Bass, testified that they did not see any marks on the floor. As defendant does not complain of the amount of the verdict we refrain from detailing her injuries and the treatment thereof.

Defendant maintains that there is no evidence to establish negligence on its part and that the court should have allowed its motion for a judgment notwithstanding the verdict. The plaintiff insists that the evidence establishes defendant's negligence and sustains the verdict, and that any conflict in the testimony was a question of fact for the jury. The keeper of a restaurant is required to use reasonable care to see that the premises are reasonably safe for its patrons. Denny v. Goldblatt Bros. Inc., 298 Ill. App. 325. The law does not make the owner or keeper of a restaurant the insurer of persons invited thereon. It is the law of **this state that** when an invitee falls upon a foreign substance on the floor of the restaurant, the keeper is not liable unless (1) the foreign substance was placed on or got onto the floor by reason of negligence on the part of the restaurant keeper or his employees, and (2) where there is no showing that the foreign substance got on the floor by the negligence of the restaurant keeper, then the law requires as a condition of liability, proof (a) that the owner of the premises had knowledge of the existence of the foreign substance on the floor of the premises, or (b) that the foreign substance



remained upon the floor of the premises for a sufficient period of time within which the keeper by the exercise of ordinary care should have known of its existence, and (c) that the substance created a dangerous condition on the premises. In the case at bar there is no evidence from which an inference might be drawn that an onion ring got on the floor through the negligence of any employee of the defendant.

Plaintiff asserts that obviously the grilled onion ring did not get on the floor by self-propulsion, and that it was there either because it was dropped from the stand-up table by the act of a customer while eating a meal there or because it was brushed carelessly from the stand-up table by defendant's bus boy while he was clearing off the dishes and cleaning the stand-up table and remained on the floor through his negligent failure to sweep it up while he was sweeping around the table. Plaintiff states that the defendant is liable for the onion ring causing her fall, that it was on the floor through the negligence of its employees or had fallen there by the act of a third party and remained there a sufficient length of time whereby defendant in the exercise of ordinary care could have known of its existence and removed it, and that she was required to establish only one of these alternatives. She says that the evidence might well establish either alternative. The evidence establishes



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that the restaurant was well lighted. There is no contention that the floor was in any way defective. There is no evidence or reasonable inference from evidence how the onion ring got upon the floor, when it got on the floor or how long it remained on the floor prior to the occurrence. Plaintiff states that it is common knowledge that sliced onions are frequently served with a hamburger sandwich such as was served to the plaintiff. There is no testimony as to the kind of sandwich either of the two men brought to the stand-up table. The evidence is undisputed that no employee of the defendant had knowledge of the presence of the onion ring or any foreign substance on the floor which might have caused the plaintiff to fall. The plaintiff testified that when she entered the restaurant the floor appeared to be clean and free from any debris or foreign substance. She testified that immediately prior to the occurrence the floor was clean and that she saw nothing on the floor prior to her fall which might have caused her to fall. We have read the cases cited by the parties in support of their respective positions. No good purpose will be served by discussing the application of the well-known principles of law to the factual situations in the cited cases. Plaintiff places great reliance on the case of Denny v. Goldblatt Bros. Inc., 298 Ill. App. 325. In that case the court called attention to testimony (331) "which would tend to show that some



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employee of defendant had attempted to clean the doorway but had not done a good job." We find that there is no evidence tending to establish negligence on the part of defendant and that the court erred in not allowing defendant's motion for a judgment notwithstanding the verdict.

Therefore the judgment of the Circuit Court of Cook County is reversed and the cause is remanded with directions to enter judgment notwithstanding the verdict for the defendant and against the plaintiff.

JUDGMENT REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

NIEMEYER, P. J., and FRIEND, J., CONCUR.





A

47144- 47145

FIRST COIN MACHINE EXCHANGE,  
INC., an Illinois Corporation,

Appellee,

v.

CITY OF CHICAGO, a Municipal  
Corporation, and RICHARD J.  
DALEY, Mayor of the City of  
Chicago; WILLIAM T. PRENDERGAST,  
City Collector of the City of  
Chicago, and JOHN C. MARCIN, City  
Clerk of the City of Chicago,

Appellants.

13 I.A.<sup>2d</sup> 251

INTERLOCUTORY APPEAL  
CIRCUIT COURT,  
COOK COUNTY.

47158

GILBERT KITT and VIRGINIA KITT,  
Copartners doing business as  
EMPIRE COIN MACHINE EXCHANGE,

Appellee,

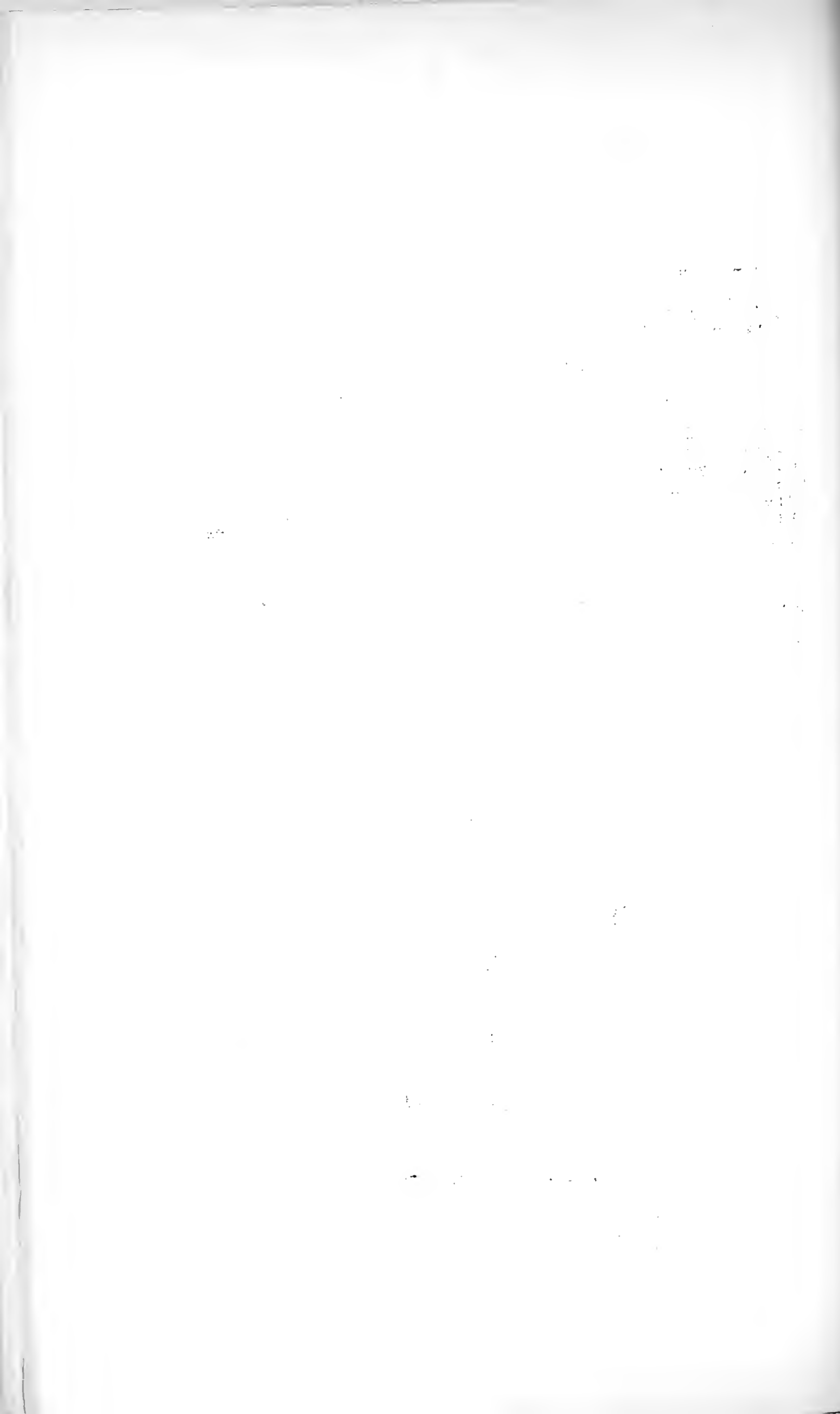
v.

CITY OF CHICAGO, a Municipal  
Corporation, and RICHARD J. DALEY,  
Mayor of the City of Chicago;  
WILLIAM T. PRENDERGAST, City  
Collector of the City of Chicago;  
and JOHN C. MARCIN, City Clerk of  
the City of Chicago,

Appellants.

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

In each of three actions the plaintiff sought  
a declaratory judgment that certain amusement machines  
owned by it are neither bagatelle nor pigeonhole tables  
and may be operated in places of public resort without  
violating the provisions of Section 193-26 of the Municipal  
Code of Chicago, that it is entitled to a license for the  
machines in accordance with the procedures set forth in



-2-

Sections 101 and 104 of the Municipal Code, and that it is entitled to operate the machines in places of public resort free from seizure and confiscation by the defendants and their agents. Each complaint also prays for a temporary injunction restraining the defendants from interfering in any way with the use and operation of the amusement machines during the pendency of the action. In a separate count in each complaint the plaintiff avers that the defendants wilfully and without cause refused to issue it a license for the machines in disregard of their duty to do so under Sections 101-3, 101-4 and 101-5 of the Municipal Code, and prays that a writ of mandamus issue commanding the defendants to issue the license to it. An order for a temporary injunction was entered restraining the defendants from interfering with the use and operation of the amusement machines. On the denial by the court of defendants' motion to vacate and dissolve the injunction the defendants appealed. Cases No. 47145 and 47158 have been consolidated with case No. 47144.

The complaint alleges that the automatic amusement machine called Ringer Ball is played on a table approximately 26 inches wide and 8 feet long; that at the far end of the table away from the player are mounted a series of holes surrounded by a fishnet cage into which the player attempts to toss a wooden ball; and that each hole is marked for score and players attempt to toss the ball into the highest scoring hole. Each hole is flanked



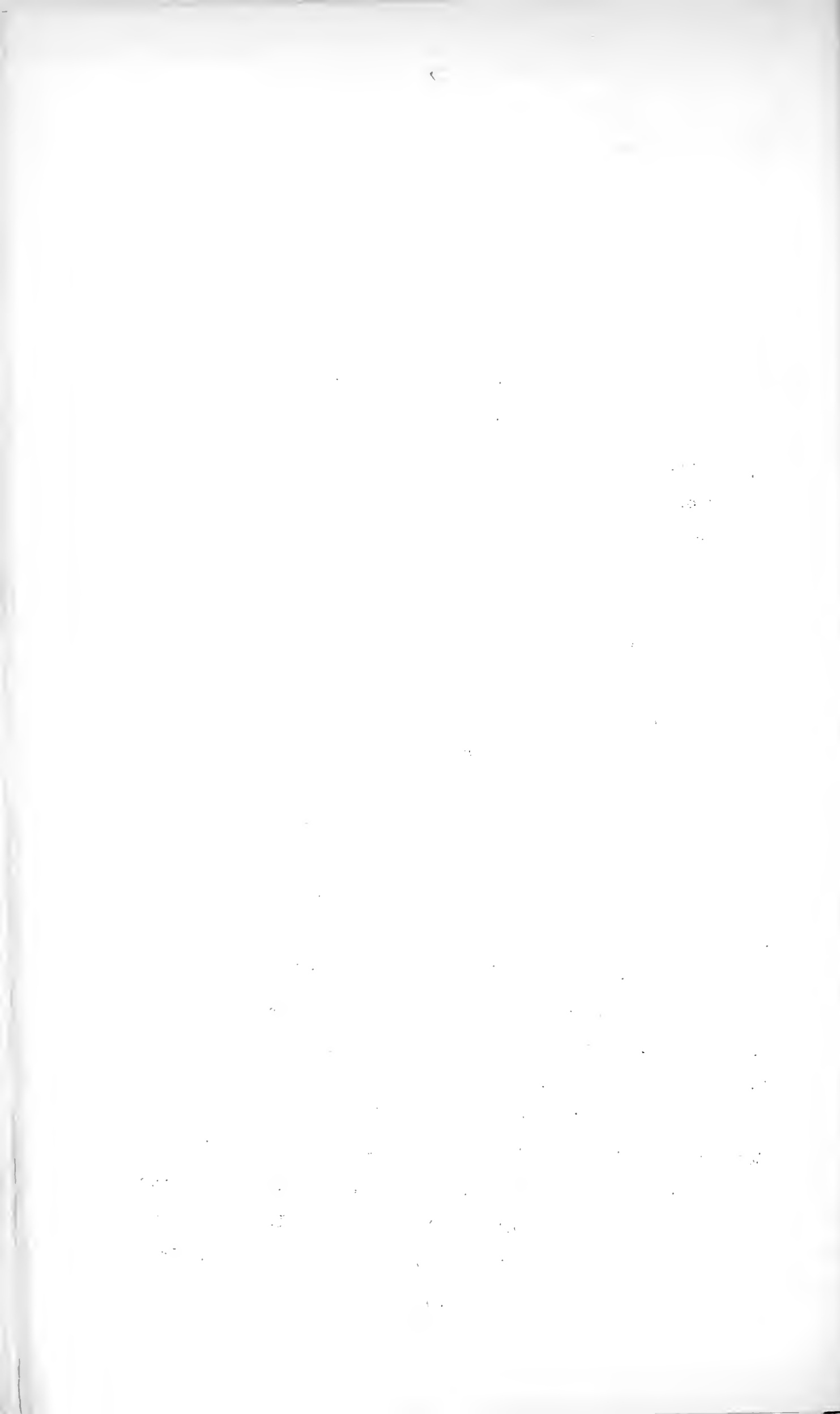
with rubber belting so that a ball not accurately thrown can bounce off the belting and fall into a lower scoring hole. The complaint sets forth the scoring rules. It states that Ringer Ball is a coin operated game of amusement only, which may be played by either one or two players. Upon insertion of a coin into the coin chute the balls are released into a trough and manually put into play by the player. The complaint alleges that Ringer Ball is a game of skill; that the play of the game is dependent entirely upon the skill of the player; that it is not possible for the player to win any free games; and that offers of prizes or awards are not made to the players. The construction and appearance of the machine more fully appears from a photographic picture attached to the complaint.

The complaint alleges that the machines are neither bagatelle nor pigeonhole tables, nor do they come within the definition of any other device the keeping and use of which is prohibited, that the machines are not played upon a table nor do they have any arches, springs or pins or any of them to control, deflect or impede the direction or speed of anything. The complaint states that an actual controversy exists between the parties with regard to the interpretation of Section 193-26 of the Code and its application to the amusement machines, in that the defendants contend that the machines are bagatelle and pigeonhole tables within the meaning of that section of the Code, and that consequently plaintiff is not entitled to



a license for any such machine and that defendants are entitled to seize and confiscate the machines pursuant to that section, while plaintiff contends that the machines are neither bagatelle nor pigeonhole tables within the meaning of that section, and that it is entitled to operate the machines without interference from the defendants and without the machines being subject to seizure and confiscation by the defendants pursuant to the provisions of that section. Plaintiff says that unless it is granted relief it will have expended large sums of money for the acquisition and operation of the amusement machines and will have suffered losses as a result of seizure and confiscation of the machines by the defendants without a judicial determination as to the meaning of Section 193-26 of the Code and its application to the amusement machines.

Defendants maintain that the court erred in granting the temporary injunction because there is an adequate remedy at law. The legality of the machines is not an issue here. It is well established that when mandamus is available as a remedy, a court of equity has no power to issue a temporary injunction. Injunction and mandamus are not correlative remedies applicable to the same subject matter. See Lyle v. City of Chicago, 357 Ill. 41; D. Gottlieb & Co. v. City of Chicago, 342 Ill. App. 523. In the case at bar the ultimate issue is whether the plaintiff is entitled to a license for the allegedly legal amusement devices. On this issue the plaintiff has an adequate remedy at law by





mandamus. The plaintiff also has a right to have the court decide the question it raises under the declaratory judgment procedure. The issuance of or the refusal to issue an automatic amusement machine license by the city officials is a ministerial act. Each plaintiff meets the arguments of the defendants by asserting that under the facts alleged the issuance of an automatic amusement machine license bears no relationship to the enforcement of the bagatelle ordinance complained of, and that therefore mandamus is neither an adequate nor exclusive remedy, citing the case of Lamere v. City of Chicago, 391 Ill. 552. Each plaintiff urges that granting mandamus for a license under Chapter 104 of the Code in no way protects it from the seizure provisions of Section 193-26 of the Code. Plaintiff asserts that its machine is or is not an automatic amusement machine as defined in Section 104.1 of the Code; that if its machine is an automatic amusement machine, all the requirements of the ordinance having been complied with, it is not subject to prosecution under Section 104-8 of the Code; and that if its machine is not an automatic amusement machine, it requires no license under Chapter 104 of the Code. The issue on this appeal is not whether plaintiff's machine falls within the language of the ordinance but whether it is entitled to a temporary injunction. In our view the plaintiff has an adequate remedy at law and the chancellor erred in granting the temporary injunction. On a trial of the mandamus case it will be incumbent upon each plaintiff to show a clear



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legal right to the relief it seeks. On a trial should the court decide that the machine violates the bagatelle or pigeonhole ordinance (Sec. 193-26), manifestly plaintiff would fail to establish that it had a clear legal right to the issuance of the license.

For the reasons stated the order entered in each case granting the temporary injunction is reversed.

Orders reversed.

Niemeyer, P. J., and Friend, J., concur.

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fact that the system is not  
self-sufficient, and that it  
must be supplemented by other  
means.

2. The second is the fact

that the system is not self-sufficient.

3. The third is the fact that the

system is not self-sufficient.

4. The fourth is the fact that the

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47049

DOROTHY GARRETT,

Appellee,

v.

NATIONAL TEA CO.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

13 I.A.<sup>2d</sup> 252

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

Dorothy Garrett filed an action to recover damages resulting from a fall over a box in the aisle of a store of the National Tea Company. A trial resulted in a verdict for \$2,500. Defendant's motions for a directed verdict and for judgment notwithstanding the verdict were overruled. Judgment was entered on the verdict and the defendant appeals.

The store is located on the southwest corner of 53rd and Halsted Streets, Chicago. The entrance is from Halsted Street at the south end of the store. As a customer enters the premises, she first walks to the west into a vestibule. She then turns to the north into the store. There is a wide aisle extending from the entrance in a northerly direction. This aisle is in the front or easterly part of the store. There are five checkout counters in the store. Plaintiff entered the defendant's store on Tuesday, January 18, 1955. As she entered she did not notice anything in the exit aisle. She completed her shopping sometime between 11:30 A.M. and 12:30 noon, paid for her purchases at a checkout counter, picked up the large bag

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of groceries, which reached from her waist to her eyes, and holding it in front of her walked toward the exit door of the store. As she walked through the exit turnstile by the door she tripped over a box on the floor which she did not see until after she had fallen. The box was sealed and was about 10 inches high and 15 to 18 inches square. She thought it contained canned goods but could not be absolutely sure. Her left foot struck the box and she fell over but did not fall completely as she supported herself on her elbows. She got up, tried to push the box out of the way with her right foot but could not. She fell again but again supported herself so she did not fall all the way to the floor. She then stepped over the box and left the store. She stated that one of the employees at the checkout counters called out "What happened?" at the time she fell. This was denied by defendant's employees who were working at the checkout counters at that time.

Plaintiff stated that after her fall she went out of the store where her husband was waiting for her and put her groceries in their automobile. She then came back and reported her fall to one of the girls at a checkout counter. She said she was told the manager was out. Plaintiff stated that the girl would not give her name but the plaintiff left her name with the girl. Plaintiff stated that at the time she came back into the store the box was not on the floor. Plaintiff went to a hospital for X-rays, then took the groceries home, after which she returned to the store and talked to Blanche Hill,





-3-

a bookkeeper. At that time, plaintiff said, the box had been pushed against the wall. Defendant's employees stated that this was the first time that plaintiff reported the fall. None of the defendant's employees witnessed the fall. The cashier, Mrs. Temple, recalled seeing the plaintiff as a customer in the store during the noon hour. There was evidence that the defendant stored empty, unsealed boxes near the aisle of its store.

The defendant asserts that the plaintiff failed to make out a prima facie case in that there is no evidence that it had notice that the box was in the aisle. While it is the duty of persons who invite others upon their premises to keep such premises in a reasonably safe condition, the law does not make the owner of such premises the insurer of persons invited thereon. Deitz v. Belleville Co-op Grain Co., 273 Ill. App. 164. It is necessary to allege and prove that defendant knew of the unsafe condition or that the condition existed for a period of time from which it might be inferred that had it been exercising ordinary care it could have learned of the same. Plaintiff's testimony, viewed in its most favorable aspect, shows that there was a box in the exit aisle of the store, that she tripped and fell over the box and that she was injured as a result of her fall. There was no evidence as to how the box happened to be in the aisle of the store. There is no testimony indicating who placed the box in the aisle or that the defendant knew that the box was in the aisle. The defendant's employees said that they never saw any box



of the type described by the plaintiff stored in or near the aisle where she fell. There is no evidence as to how long the box had been in the aisle prior to plaintiff's fall. She says she saw no box there when she entered the store a short time before her fall.

Plaintiff did not trip over the type of box which defendant stored near the exit aisle of the store. She testified that she tripped over a sealed box full of canned goods. There was evidence that defendant stored empty unsealed boxes near the aisle of the store. She did not fall over one of these boxes. The storing of the empty boxes near the aisle of the store was not the proximate cause of her injuries. Plaintiff did not make any proof that defendant knew that the box was placed in the aisle or how long it had been there. On the record it was the duty of the court to enter judgment notwithstanding the verdict. Therefore the judgment of the Municipal Court of Chicago is reversed and the cause is remanded with directions to enter judgment for the defendant and against the plaintiff.

JUDGMENT REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

NIEMEYER, P. J., and FRIEND, J., CONCUR.

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47039

THE MID-CITY NATIONAL BANK OF  
CHICAGO, a National Banking  
Association,

Appellee,

v.

JOHN GRAY and LOUVERTA GRAY,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

13 I.A.<sup>2d</sup> 253

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

On November 21, 1955, a judgment by confession was entered in favor of the Mid-City National Bank of Chicago against John Gray and Louverta Gray for \$2,701.00, which included attorney's fees of \$207.19. The judgment was entered on a promissory note dated July 23, 1954, payable to "Seal Master Home Improvement" for \$3,104.93, payable in 60 successive monthly installments of \$51.76 each, except the final payment "which shall be for the balance due on this note," commencing September 18, 1954, and purporting to be signed by the defendants. On December 21, 1955, the defendants filed their verified petition stating that they did not make, execute, sign or deliver the note; that it constitutes a forgery; that on July 13, 1954, the defendant John Gray, out of the presence of Louverta Gray and without her knowledge or authorization, executed an application for work to be done in the building at 6613 South Wabash Avenue, Chicago, for a price of \$2,490; that the work was begun but was not completed; that the party contracting to do the work did not intend to do the work but intended to cheat and defraud



John Gray; that subsequent thereto John Gray notified plaintiff that the work was not completed and of the fraudulent intention of the contractor, but that nevertheless the plaintiff purchased forged instruments purporting to be signed by petitioners. Petitioners asked that the judgment be vacated. On January 10, 1956, the court entered an order giving the defendants leave to appear and defend, the judgment to stand as security and the petition to stand as an answer. On the trial of the case without a jury the court entered a judgment confirming the judgment. Defendants appeal.

Section 23 of the Negotiable Instruments Act (Par. 43, Ch. 98, Ill. Rev. Stat. 1955) provides that where a signature is forged or made without authority it is wholly inoperative, and no right to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. Section 35 of the Civil Practice Act provides that the allegation of the execution of any written instrument is admitted unless denied in a pleading verified by oath. The defendants denied that they signed, executed or delivered the note and said that the note "constitutes a forgery." Under the verified pleading of the defendants the burden was on the plaintiff to prove the execution of the note by the defendants. Bell v. Bennett, 188 Ill. App. 62. Where a defendant has been let in to plead upon the opening of a judgment by confession, the burden rests upon

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the plaintiff to prove his case the same as if there had been no judgment by confession. Cohen v. Rosenthal, 207 Ill. App. 331. In proving execution and delivery of the note plaintiff could rely upon such inferences as arise from the evidence, direct or circumstantial, from which the fact of execution and delivery could be determined. Niehaus v. Niehaus, 2 Ill. App. 2d. 434. In an oral opinion the trial judge said that the purported signature of John Gray was in his writing but that the purported signature of Louverta Gray was put upon the note by her husband, John Gray, and that by her action she "confirmed and approved the act" of her husband in affixing her signature to the instrument.

The defendants, husband and wife, owned real estate improved with a house at 6613 South Wabash Avenue, Chicago. They **lived** in the house and rented three apartments. Mr. Gray contracted to have certain improvements made in the house. Mrs. Gray says that she did not know that the work was being done as she was absent from the city. A postal card dated July 19, 1954, which she mailed, indicated that she knew that certain improvements in the house were being made. The defendants testified that they ordered work to be done by a different contractor. The plaintiff acquired the note and supporting documents from a contractor in the usual course of business. The defendants made monthly payments on the note for a year. They assert that they made the payments on the advice of an attorney who said to them: "If you are going to sue for forgery, you will have to make the payments and pay until I tell you to stop." It will be observed that



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in the petition to vacate the judgment the defendants state that Mr. Gray executed an application for work to be done in the building for a total price of \$2,490.

In their testimony the defendants denied that they signed or authorized anyone to sign the note. While under the pleadings the burden of proof was on the plaintiff, the defendant proceeded first in the introduction of evidence. There was a full presentation of all the evidence available. The plaintiff did not introduce evidence of any witness who said he saw either defendant sign the note. There is strong circumstantial evidence to support the findings of the court. The defendants were improving their house about the time the note was signed. Mr. Gray signed an application "for work to be done in the building" for a price of \$2,490. There is evidence that Mrs. Gray knew of this work. They made monthly payments on the note as required by its terms for a year. We are satisfied that the evidence in the record supports the finding of the trial judge.

Therefore the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

NIEMEYER, P.J., and  
FRIEND, J., CONCUR.

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47062

PEOPLE OF THE STATE OF  
ILLINOIS,

Appellee,

v.

MARTIN LEWIS,

Appellant.

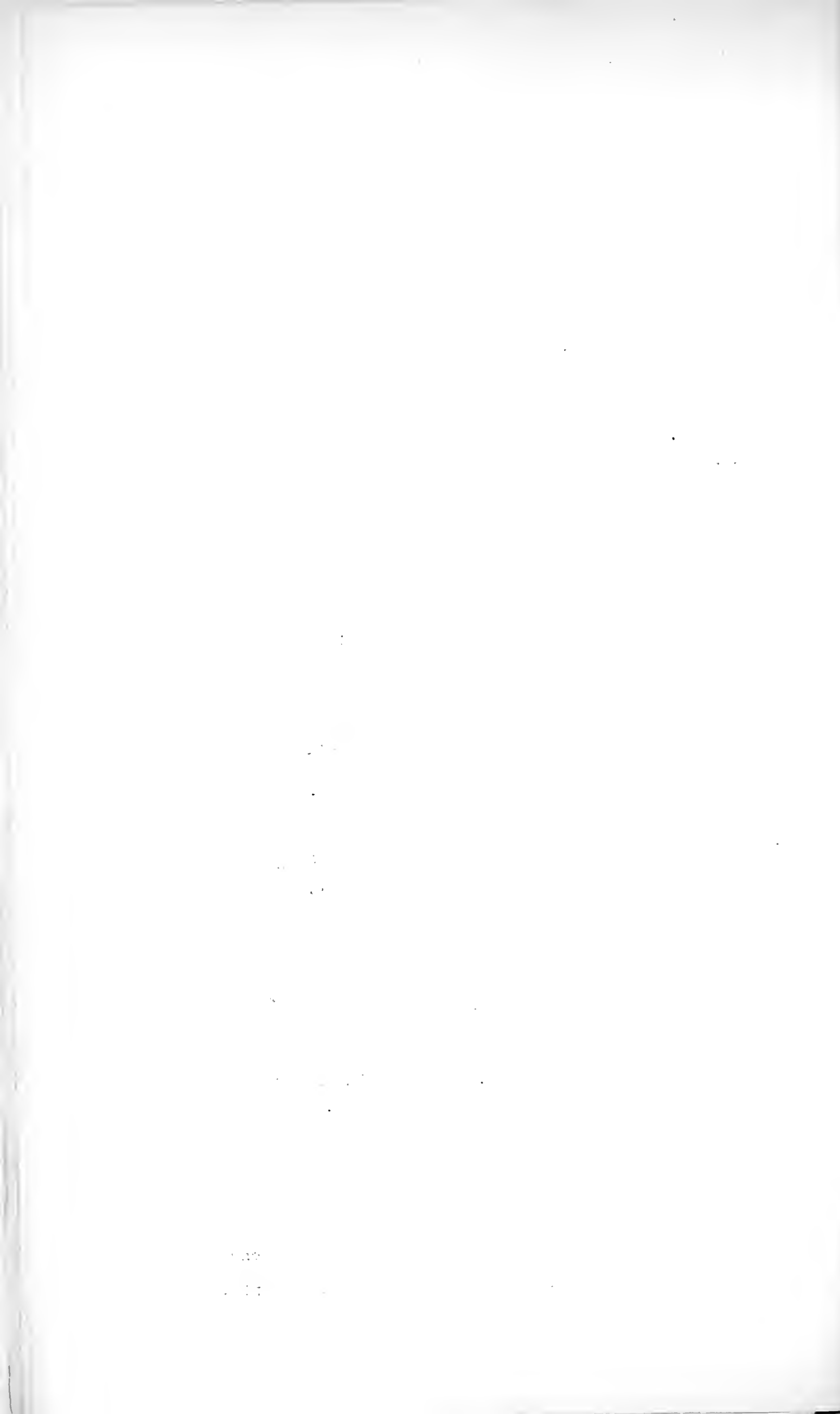
APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO

13 I.A.<sup>2d</sup> 253

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

An information charged that on January 14, 1956, Martin Lewis, upon a highway in Chicago, did then and there "unlawfully violate Section 47 U.A.R.T. under influence," contrary to the statute in such case made and provided. The information also contains the following notation: "Make of car 54 Buick Sdn. License 1963-027 Ill. 55." There was a plea of not guilty and a jury waiver. Following a trial the court found the defendant guilty in manner and form as charged in the information. The court adjudged the defendant "guilty of the criminal offense of violation of Section 47 Motor Vehicle Law, driving a vehicle within the State of Illinois while under the influence of intoxicating liquor in violation of Section 47 Uniform Act Regulating Traffic on highways, on said finding of guilty," and sentenced him to confinement in the House of Correction for a term of 90 days and to pay the costs. The defendant prays for a reversal of the judgment.

It is well settled that an indictment or information must charge all the elements of the offense. An indictment or information charging an offense defined



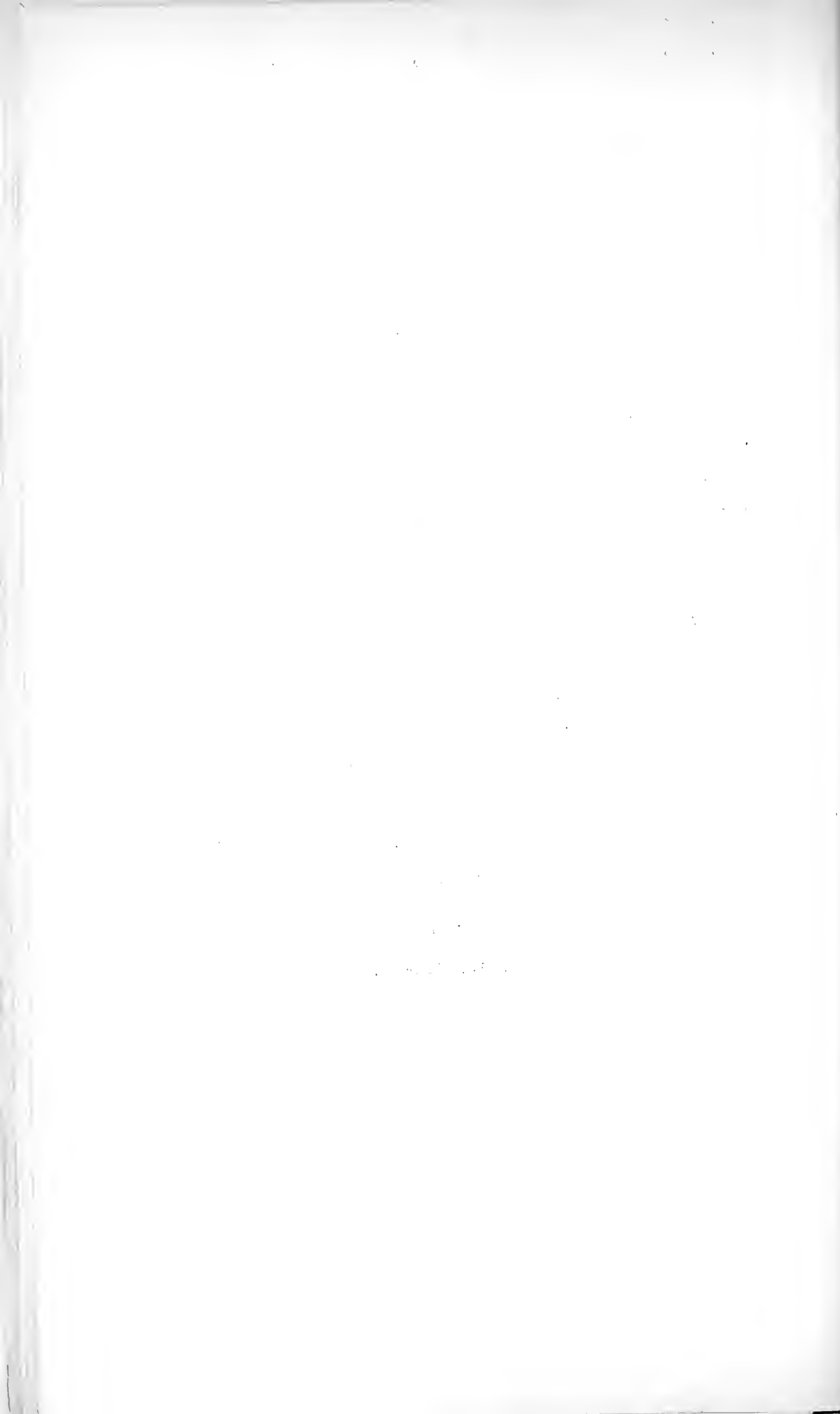
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by statute should be as descriptive of the offense as is the language of the statute and should allege every substantial element of the offense. If the indictment or information is void, the error may be reached in this court even though there was no motion to quash, for a new trial or in arrest of judgment. It has been held that an error may be reached even though there has been a plea of guilty in the trial court. See People v. Sowrd, 370 Ill. 140; People v. Green, 368 Ill. 242; and People v. Williams, 4 Ill. App. 2d, 506.

The information does not charge that the defendant drove a motor vehicle while under the influence of intoxicating liquors. As the information does not contain the essential allegations charging the defendant with any criminal offense, it is void. Therefore, the judgment of the Municipal Court of Chicago is reversed.

JUDGMENT REVERSED.

NIEMEYER, P. J., and FRIEND, J., CONCUR.





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47017

PEOPLE OF THE STATE OF ILLINOIS, }

Defendant in Error, }

v. }

ROGER E. RICHARDSON, }

Plaintiff in Error. }

13 I.A.<sup>2d</sup> 254

ERROR TO

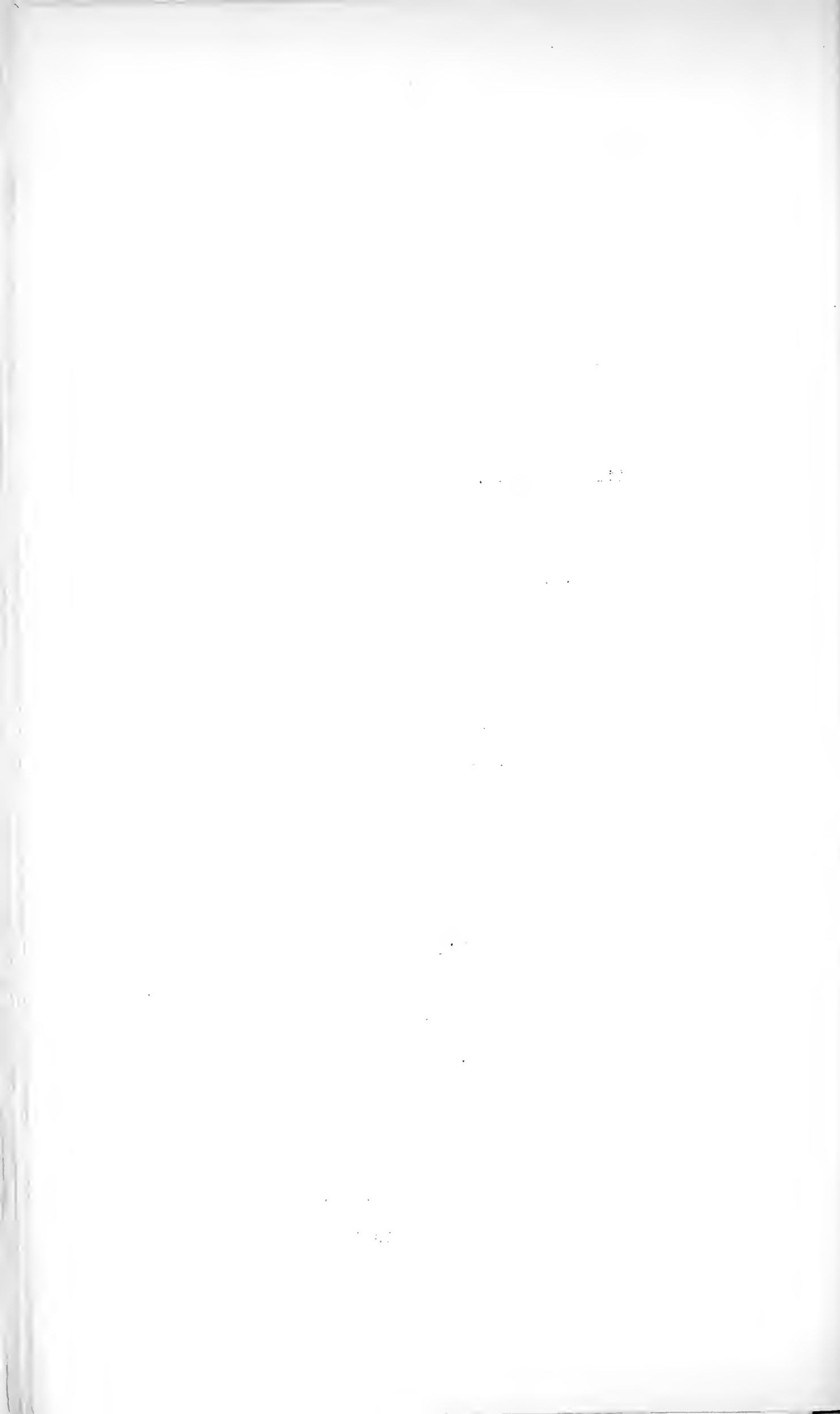
COUNTY COURT

COOK COUNTY

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

A five count criminal information charged that Roger E. Richardson violated the Medical Practice Act. He was found guilty on Counts 1, 3, 4 and 5 and sentenced to the County Jail for a term of 60 days on each count, the sentences to run concurrently, and to pay a fine of \$100 on each count. Judgment was entered accordingly. Defendant prosecutes a writ of error to review the judgment.

The defendant has an office on the second floor at 5100 West Chicago Avenue, Chicago. On the window is a sign which reads: "Dr. Richardson, Chiropractor and Spinal Analyses." The office consists of a reception room, a main office and several small rooms. There is an X-ray machine in the reception room, In another room there is a machine called a microdynameter. The small rooms contain chiropractor tables. In his private office the defendant has equipment for taking blood pressure. The receptionist in the office, Catherine McGrory, refers to the defendant as "Dr. Richardson." She receives his "patients" taking

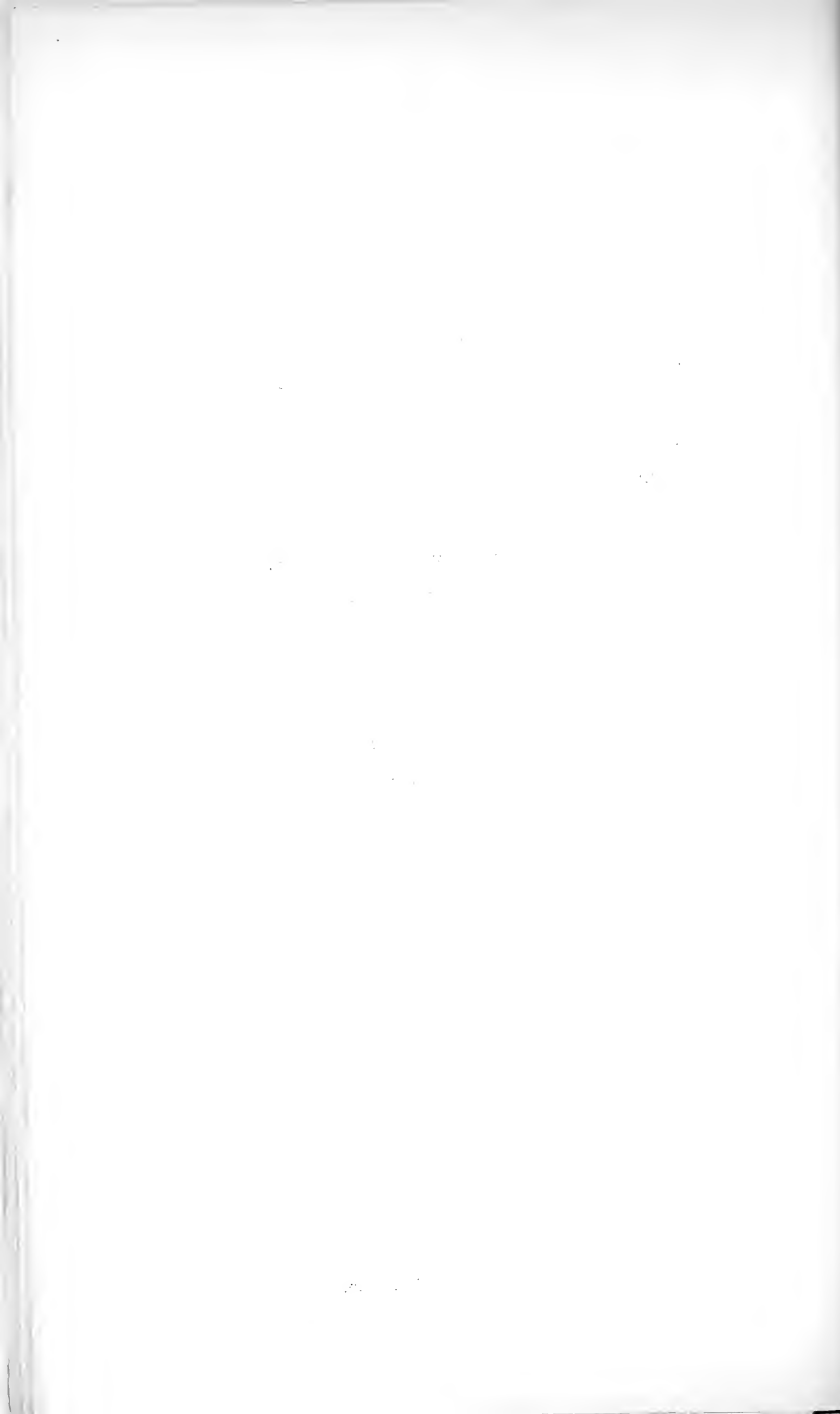


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the name, address, height and weight. She also records on a chart the examination findings dictated by the defendant.

On October 20, 1953, Mrs. Stella Bekeleski, an investigator for the Department of Education, called at defendant's office. She was greeted by Catherine McGrory who recorded the usual information and then ushered Mrs. Bekeleski into the defendant's private office. Mrs. Bekeleski complained to the defendant that she had pains in her back. The defendant told her that he would see if he "couldn't locate the trouble in the spine." The patient was then sent to a dressing room to put on a dressing gown. From the dressing room she was taken to the microdynameter room. The defendant described the microdynameter as "a galvanometer which measures the flow of electricity." He testified that "this instrument can give us the determining things that we are looking for, such as when we are talking about the spine, it shows which vertebrae is subluxated and which vertebrae is not subluxated, and it also gives us the general health condition of that patient so we know what to do when we start with a patient."

The defendant used the microdynameter on the patient, placing portions of the apparatus to her tongue, arms, hands, neck and back. He called the readings taken from the machine and the receptionist recorded them. The readings included the patient's "potential energy" "metabolic index" "oxygenation" "alkaline balance" and "dynamic energy."



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The metabolism reading was 180. According to defendant this indicated that the patient was "hypersensitive" or had "high tensed nervousness." The defendant testified that in his microdynameter analysis he found a subluxated condition at the atlas axis vertebrae of the spine. He stated that an organ of the body is subluxated when it causes pressure on the spinal cord and that as to the vertebrae it means that one of the vertebrae has this condition with respect to the one above and one below, so there is a pinching of the nerves. After checking the patient with the microdynameter the defendant explained to her that he had found two subluxated vertebrae and advised that it was necessary to take X-rays. She consented and the defendant took two X-rays of her back and made readings of them. The patient was charged \$25 for this first visit. She paid \$10 and was told by the receptionist that 15 treatments would be \$50 and that for \$75 the treatments would continue indefinitely.

The defendant has been maintaining an office as a chiropractor since May, 1952. He does not have a license. He knows that the Department of Registration and Education supervises the practice of medicine and chiropractic in this state, but he never applied to take the examination for a license. He defined "chiropractic" as a "system of locating and adjusting subluxated vertebrae of the spinal column, applying adjustic thrusts to those subluxations to correct the cause of disease." In his

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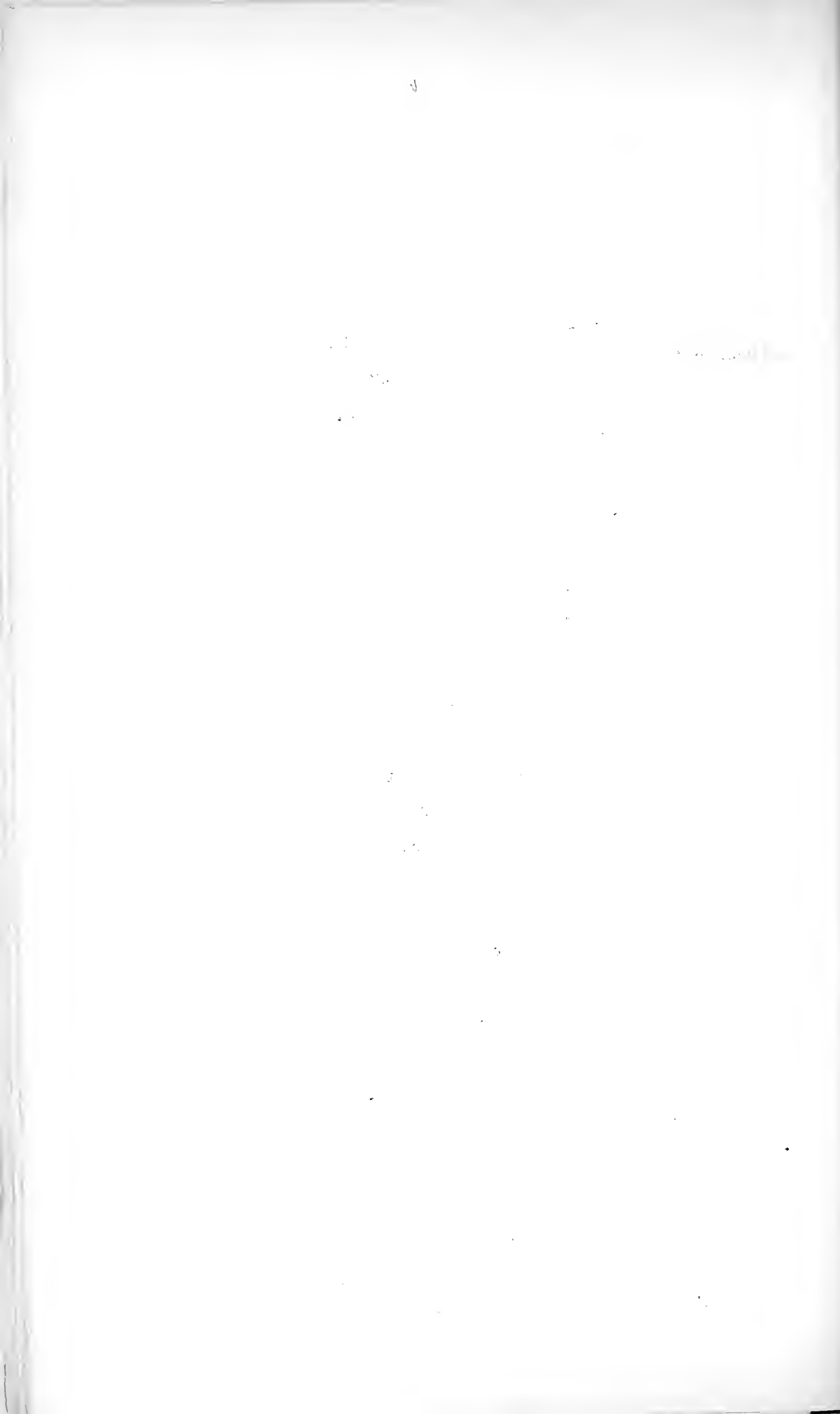
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reception room he has pamphlets and magazines about **chiropractic** bearing his name, which anyone may take free of charge. The patient took several of them, which were received in evidence. Mrs. Bekeleski testified that the defendant told her that she was extremely nervous, had excessive acidity, curvature of the spine, weakened muscles and that she was in bad shape and needed treatments. This the defendant denied. She testified that the defendant had her lie down on a table and manipulated up and down her spine, cracking her bones with his hands. He pressed certain spots, rotating very hard, causing her pain and she screamed. The defendant and his receptionist testified that this did not happen. The defendant testified that he requested the patient to return the next day for the treatment but that she did not return. Mrs. Bekeleski also testified that the defendant tested her blood pressure and gave her a cardiogram. The defendant denied this.

The defendant maintains that the verdict is contrary to the evidence. Each count alleged that on October 20, 1953, the defendant was not possessed of "a valid existing license issued by the State of Illinois" to practice the treatment of human ailments in any manner. Count I alleges that the defendant unlawfully diagnosticated the supposed ailment of Stella Bekeleski to be that she was extremely nervous, had weakened muscles, a curvature of the spine and her vertebrae were not aligned right at the top of the spine, causing pressure on top of the nerve. The defendant admitted that he had no license and that he





examined Mrs. Bekeleski to locate the "trouble in the spine" which caused the pain of which she complained. He admitted that after the examination he told her he found two subluxated vertebrae in the cervical area causing nerve impairment. To diagnosticate is to determine by examination the nature and circumstances of a diseased condition. It is the art or act of recognizing the presence of disease from its symptoms and deciding as to its character. (Webster International Dictionary, Second Edition.) This is what the defendant purported to do. That he describes the conclusion he reached after the examination as an analysis rather than a diagnosis, does not mitigate from the fact that it was a diagnosis. The physical examination of the patient's vertebrae upon her complaint of a backache, followed by his announced decision that the vertebrae were in a position creating pressure on her nerve, constitutes a diagnosis made in violation of the Medical Practice Act.

The third count alleges that the defendant, with the intent of receiving a fee therefor, unlawfully suggested, recommended or prescribed for Mrs. Bekeleski a form of treatment, the treatment being the manipulation of her spine with his fingers. Mrs. Bekeleski testified that the defendant applied manual thrusts to her back. On direct examination he denied this but on cross-examination he said he gave the patient "a chiropractic adjustment." He testified that he told Mrs. Bekeleski that the examination revealed two subluxated vertebrae and that he asked her to return the following day to have an adjustment. He testified



that chiropractic adjustment is the manual thrusts to a subluxated condition existing in the spine, made in order to correct the cause of disease. He admitted the receipt of a fee of \$10.

The fourth count alleges that the defendant attached the abbreviations "Dr." and "D.C." and the word "Chiropractor" to his name as it appears on his office windows, business cards and office pamphlets in a manner indicating that he was engaged in the treatment of human ailments as a business. It is admitted that the word "Chiropractor" and the abbreviations "Dr." and "D.C." are attached to his name in the places alleged. On the office window appears "Dr. Richardson, Chiropractor and Spinal Analyses." Chiropractic is a drugless method of treating ailments of the human body, chiefly by manipulation of the spinal column with the hand. People v. Love, 298 Ill. 304. By this sign the defendant advertises to the public that he is in that profession. The printed pamphlets entitled "Epilepsy" "Skin Eruption" "Tonsillitis" bearing the subtitle "What will chiropractic do for it?" have the name Roger E. Richardson, D. C. in the place where authors' names usually appear. This indicates that the defendant was in the business of treating these human ailments by chiropractic methods. In People v. De Young, 378 Ill. 256, the court said (264)

"While defendant was not the author of these pamphlets, by attaching to his name as printed thereon the title 'Dr.' and by delivering them to Mrs. Hermes, he adopted the statements contained therein as his own and indicated that he was engaged in the treatment of human ailments as a business. The offense charged in the fourth count was proved beyond a reasonable doubt."



The fifth count alleges that the defendant maintained an office for the examination and treatment of persons afflicted and supposed to be afflicted with an ailment, the office being equipped with a table for that purpose. The evidence shows that defendant maintained an office and that there he examined Mrs. Bekeleski, whose supposed ailment was evidenced by a pain in her back. There was evidence that the defendant gave treatments at his office and that he recommended that the patient return for a treatment. In People v. Brown, 3 Ill. 2d. 415, the defendant was charged with the five violations contained in the information in the case at bar. The evidence showed that Brown had a sign in his office followed by the words "Palmer Graduate, Chiropractor." He gave a patient who complained of pain between the shoulder blades a manipulation massage. He had no license. The court found that the evidence supported the verdict of guilty. We are of the opinion that there is competent evidence to support the verdict.

The defendant asserts that the court committed reversible error in instructing the jury that the term "Chiropractor" is defined as a drugless method of treating illnesses of the human body, chiefly by manipulation of the spinal column with the hand, and argues that the instruction improperly told the jury in effect that in any case where a person holds himself out as a chiropractor he thereby undertakes and does treat human ailments, that it disregards the fact that a person may be a chiropractor and

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*Journal of Management Education* 30(6)p. 789-804

engaged in services to mankind that do not include treatment of human ailments, and that the instruction assumes that defendant was practicing chiropractic in all its branches. The definition is in all material aspects the same as given by the defendant in his testimony describing his activities as a chiropractor. It was based on the evidence. There was no error in giving this instruction. Defendant says that the court erred in refusing to give an instruction on the law of circumstantial evidence. The Peoples' case was not based on circumstantial evidence. The court was right in refusing to give the instruction. The court did not err in refusing to give a tendered instruction defining reasonable doubt. It has been repeatedly held that "reasonable doubt" is a term which needs no definition. See People v. Drewell, 348 Ill. 320; People v. Rogers, 324 Ill. 224. The court did not err in refusing to give an instruction tendered by the defendant on the presumption of innocence because other instructions contained the substance of the requested instruction.

Finally, the defendant urges that no count of the information charges him with an offense and that his motion in arrest of judgment should have been allowed. We find that the information is not vulnerable to attack and that the court properly overruled defendant's motion in arrest of judgment. See People v. Kabana, 388 Ill. 198; People v. De Young, 378 Ill. 256; People v. Handzik, 410 Ill. 295.





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For the reasons stated the judgment of the  
County Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

NIEMEYER, P. J., and FRIEND, J., CONCUR.



46975

THOMAS E. BRUNNER,

Appellant,

v.

YELLOW CAB COMPANY, a corporation,  
and IRVING SCHIMMEL,

Appellees.

13 I.A.<sup>2d</sup> 255

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

JUDGE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, a Chicago Park District police officer, brought suit to recover damages for injuries alleged to have been occasioned through the negligence of defendants, when he was struck by a Yellow cab while engaged in directing traffic at the intersection of Michigan Avenue and Van Buren Street in Chicago. The jury returned a verdict finding the defendants not guilty and, in answer to a special interrogatory, found the plaintiff guilty of contributory negligence. The court entered judgment on the verdict and the answer to the special interrogatory. Plaintiff filed a motion for a new trial which was overruled, and he appeals from the final judgment entered on the verdict of the jury and from the order denying his motion for a new trial.

The accident occurred shortly after nine o'clock in the morning on February 4, 1949. It was a clear day, but the surface of the street was very slippery, being covered with ice and snow. The traffic control lights were located in the approximate center of Michigan Avenue, to the north and south of Van Buren Street, and



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were mounted on a small concrete box or island. There was a sign on the north traffic control standard for southbound traffic which read: "Turn left on green arrow from right of island," and a stencil on the pavement in advance of the intersection which read "Left turn." The traffic control lights on Michigan Avenue were, commencing at the top of the signal lights, red, amber, green and left-turn arrow.

From the uncontradicted evidence it appears that plaintiff stepped off the safety island, without looking, into the path of the southbound Yellow cab. Defendant's cab was in the inner lane, the light for which was red with green arrow; with this signal vehicles in this lane had the right to enter the intersection to make a left turn. (Ill. Rev. Stat., 1955, ch. 95 1/2, par. 129 (d)). It was under these circumstances that the accident occurred. Schimmel, the driver of the cab, testified that plaintiff stepped off the safety island when the cab was about eight to ten feet away; that plaintiff was facing south and did not look north at any time. Alvin Kuznitsky, who at the time of the accident was driving a Chicago Motor coach west on Van Buren Street, was on the northeast corner of Michigan Avenue and Van Buren Street, facing west. In an accident statement made to a Yellow Cab Company investigator, he said that "the officer stepped sideways toward the west side right in front of cab which was starting skidding on ice." Another witness, Clarence Engelbretsen, driver of a bakery truck, testified that he drove west with the green light on Van Buren Street to the center of Michigan Avenue where he had to stop because



of traffic, and that he was in the second lane of traffic near the center of Van Buren Street. In his accident statement he said that "Police Officer Thomas Brunner was standing on safety island and stepped off, in path of cab. . . ." Schimmel testified that, when he was twenty-five to thirty feet away from the safety island, the lights changed to "red and green arrow"; that "when the lights changed to red, I applied my brakes"; that he tried to stop but could not because of the slippery condition of the street; that he hit plaintiff about five feet south and about four to five feet west of the safety island; and that the speed of his cab at the time of impact was about three miles per hour. Kuznitsky estimated the speed of the cab at the time of impact at from five to eight miles per hour; and Engelbretson's testimony was to like effect.

In the course of argument the following interrogatory was submitted to the jury at the request of defendants: "Was the plaintiff Tom Brunner guilty of negligence which proximately caused or proximately contributed to cause the occurrence in question?" The jury answered "Yes." It was urged by plaintiff that the court erred in submitting the special interrogatory because it had not been submitted to plaintiff's counsel prior to the commencement of the argument; that its submission was therefore untimely, that there was no evidence to support it, and that the answer of the jury was against the manifest weight of the evidence. Plaintiff's counsel claimed that he did not receive a copy of the interrogatory until he had completed the opening

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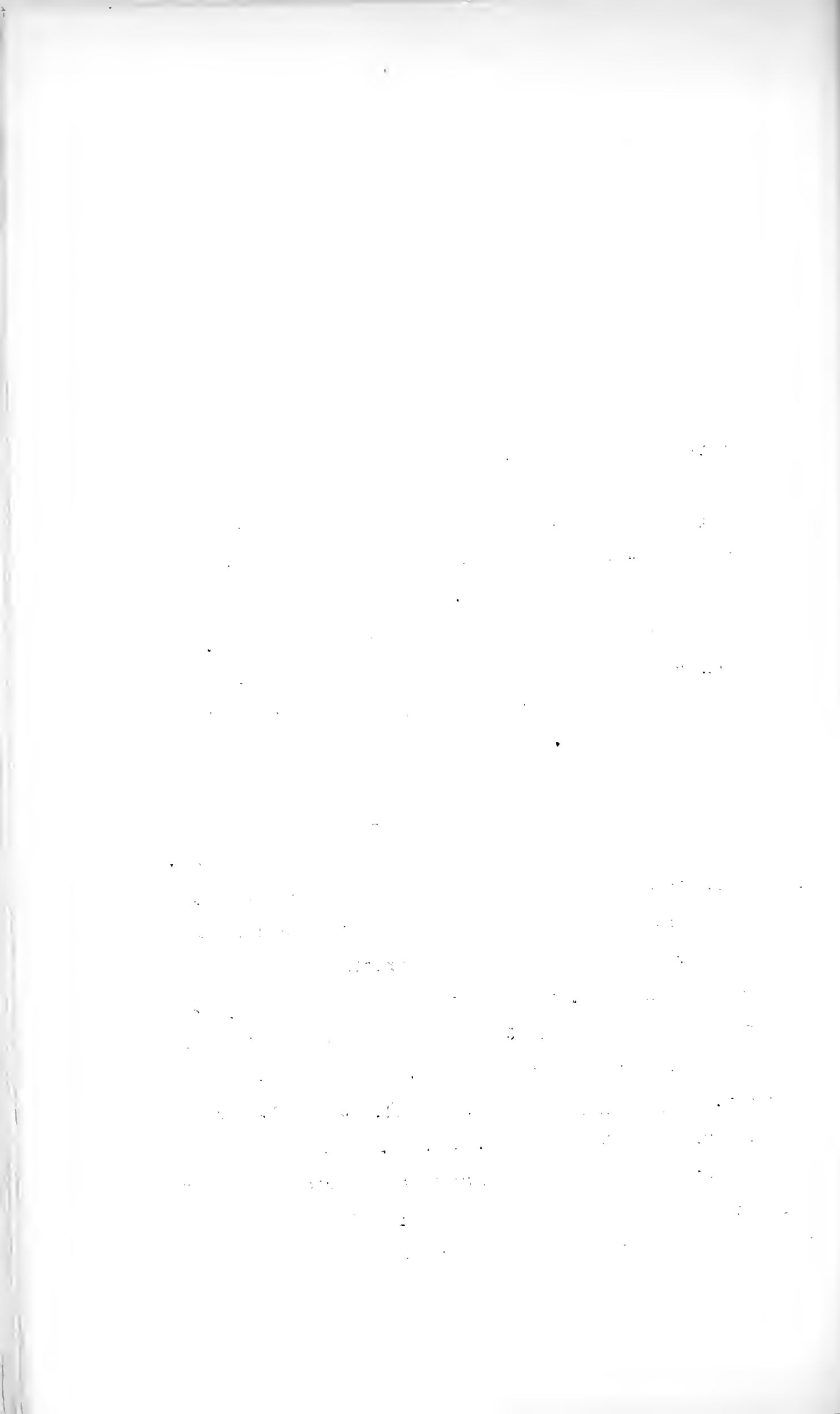
portion of his closing argument, and on motion for a new trial there was some dispute as to the exact time when it was submitted. It was the court's recollection that it had been given to plaintiff's counsel toward the end of his opening argument to the jury, and in a colloquy between court and counsel as to the exact time when the interrogatory was submitted the court made the following comment: "That [the timeliness of its submission] never occurred to me because I would have given you [Mr. Jacobs, defendants' counsel] leave to file it anyway in view of the fact that Mr. Hickey [plaintiff's counsel] had plenty of time in his final argument to discuss it." When this case was tried former section 65 of the Civil Practice Act (Ill. Rev. Stat. 1953, ch. 110, par. 189) provided that special interrogatories should be submitted to the counsel of the adverse party before commencement of argument to the jury. Obviously the purpose of the rule was to insure that counsel would have an opportunity to discuss the interrogatories in their arguments. However, the record clearly showed that plaintiff's counsel had the interrogatory before his closing argument. It also appeared from the court's statement that he would have granted plaintiff's counsel additional time to discuss the interrogatory if he had urged the point. As a matter of fact, plaintiff's counsel did touch upon it in his closing argument to the jury; in his final words he urged the jury to answer the special interrogatory "No." Plaintiff did not claim that he was in any way prejudiced by not having the special interrogatory before he commenced his opening argument;



rather, he argued that the statute is mandatory, and relied on Price v. Bailey, 265 Ill. App. 358. In that case the special interrogatory was never submitted to defendant's counsel at all, and he had no opportunity whatever to argue it to the jury.

Aside from these considerations, defendants' counsel argued that plaintiff did not move to set aside the answer to the interrogatory; that although he filed a motion for a new trial specifying some fifteen grounds, no objection was made therein, except in general terms, to the giving of the special interrogatory nor to the answer of the jury. Certainly plaintiff did not object specifically that the submission of the special interrogatory was untimely, that the evidence did not support it, or that the answer was against the manifest weight of the evidence. It was not in any sense a motion to set aside the answer.

The rule is well settled in this state that when a motion for a new trial is filed in writing specifying the grounds relied on, then all other grounds are waived. People v. Cohen, 352 Ill. 380; Donnelly v. Pennsylvania R. Co., 342 Ill. App. 556; Weinrob v. Heintz, 346 Ill. App. 30. Jacobs v. Illinois Terminal Co., 262 Ill. App. 481, and Rubottom v. Crane Co., 302 Ill. App. 58, hold that a party is conclusively bound by the answer to a special interrogatory unless he moves to set aside the finding, and unless he assigns error in his motion for a new trial complaining



of the answer to the interrogatory. A general objection that the verdict is contrary to the manifest weight of the evidence is not sufficient to preserve the point. Brime v. Belden Manufacturing Co., 287 Ill. 11; Erant v. Chicago & Alton R. R. Co., 294 Ill. 606; Bituminous Casualty Corp. v. Langenderfer, 344 Ill. App. 554 (Abst.).

Plaintiff argued that, aside from the foregoing legal consideration, there was no evidence warranting the submission of the interrogatory, and that the jury's answer was against the manifest weight of the evidence. As to this contention, it may be briefly stated that, according to the defendant driver's uncontroverted evidence, plaintiff had stepped off the safety island, without looking, directly into the path of defendant's cab which was attempting to stop on the ice. Plaintiff argued, in effect, that he could not be guilty of contributory negligence because the light for the defendant driver was red with green arrow. Whether or not the defendant driver intended to turn left is irrelevant to the question of plaintiff's contributory negligence; and even though defendant's lane had a red light, as plaintiff contended, this would not relieve him of exercising ordinary care; whether he was contributorily negligent in not doing so was for the jury to decide. Moran v. Gatz, 390 Ill. 478. Nor does the right of way of a signal light, in itself, relieve a party of the duty to exercise due care and caution. Moran v. Gatz, specifically relied on in Petersen v. General Rug & Carpet Cleaners, Inc. 333 Ill. App. 47. In



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the case here under consideration plaintiff did not have the light; as a police officer he knew that the automobiles in the inner (green-arrow) lane had the right to proceed into the intersection. For this reason alone, he should have looked toward oncoming traffic. Since he had been directing traffic at that intersection for some time immediately preceding the accident he knew that the street was "very slippery, icy and . . . covered with snow." Under such hazardous conditions a reasonable man, before leaving the safety island, would take the precaution of looking at the traffic to be sure the approaching cars could stop on the ice. Accordingly, we think the jury's conclusion that plaintiff was negligent in this regard was clearly not against the manifest weight of the evidence.

Considerable space in plaintiff's brief was devoted to charges of prejudicial conduct on the part of defendants' counsel in the presence of the jury. These charges related to hospital records, to cross-examination of plaintiff with respect to Federal income tax records, to alleged suggestions that plaintiff was in a better position financially while not working and receiving his pension than he would be if serving as a police officer, to a comparison of plaintiff's take-home pay as a police officer with payments made to him after he was ordered retired from the force, and to the cross-examination of plaintiff in an endeavor to show that he was the owner of several buildings. All these alleged errors pertained solely to the question of damages; none of them in any way

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involved the question of plaintiff's contributory negligence; and if the acts complained of constituted error, they were harmless. Early Illinois Appellate Court decisions established the rule that alleged errors which pertain solely to the question of damages do not afford grounds for reversal where the jury has found the defendant not guilty. Catton v. Dexter, 70 Ill. App. 586; Cox v. City of Chicago, 83 Ill. App. 540; McCutcheon v. City of Chicago, 150 Ill. App. 232. See also the later cases of Jackson v. Fisher, 341 Ill. App. 311, and Gorems v. Bonaparte, 350 Ill. App. 326 (Abst.). This principle is especially applicable where, as here, there has been a special interrogatory covering plaintiff's contributory negligence. Jackson v. Fisher,

Lastly, it was urged that the trial court erred in the giving of several of defendants' instructions, and the refusal of several instructions tendered by plaintiff. The court gave twenty-nine instructions in all; five of these, which were discussed in plaintiff's brief, were peremptory on behalf of defendants. All the peremptory instructions complained of covered different principles of law and were not repetitious. We have carefully examined the instructions challenged by plaintiff and have reached the conclusion that the court properly charged the jury.

The principal issue submitted to the jury was whether defendants were negligent and whether plaintiff was in the exercise of ordinary care. The jury had all



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the evidence pertaining to these questions, and the court's refusal to set aside the jury's verdict was proper. Accordingly, the judgment of the Superior Court in favor of defendants is affirmed.

JUDGMENT AFFIRMED.

NIEMEYER, P. J., and BURKE, J., CONCUR.

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47021

PEOPLE OF THE STATE OF ILLINOIS, }

Defendant in Error, }

v. }

JAMES H. CROCKET, }

Plaintiff in Error. }

13 I.A.<sup>2d</sup> 255

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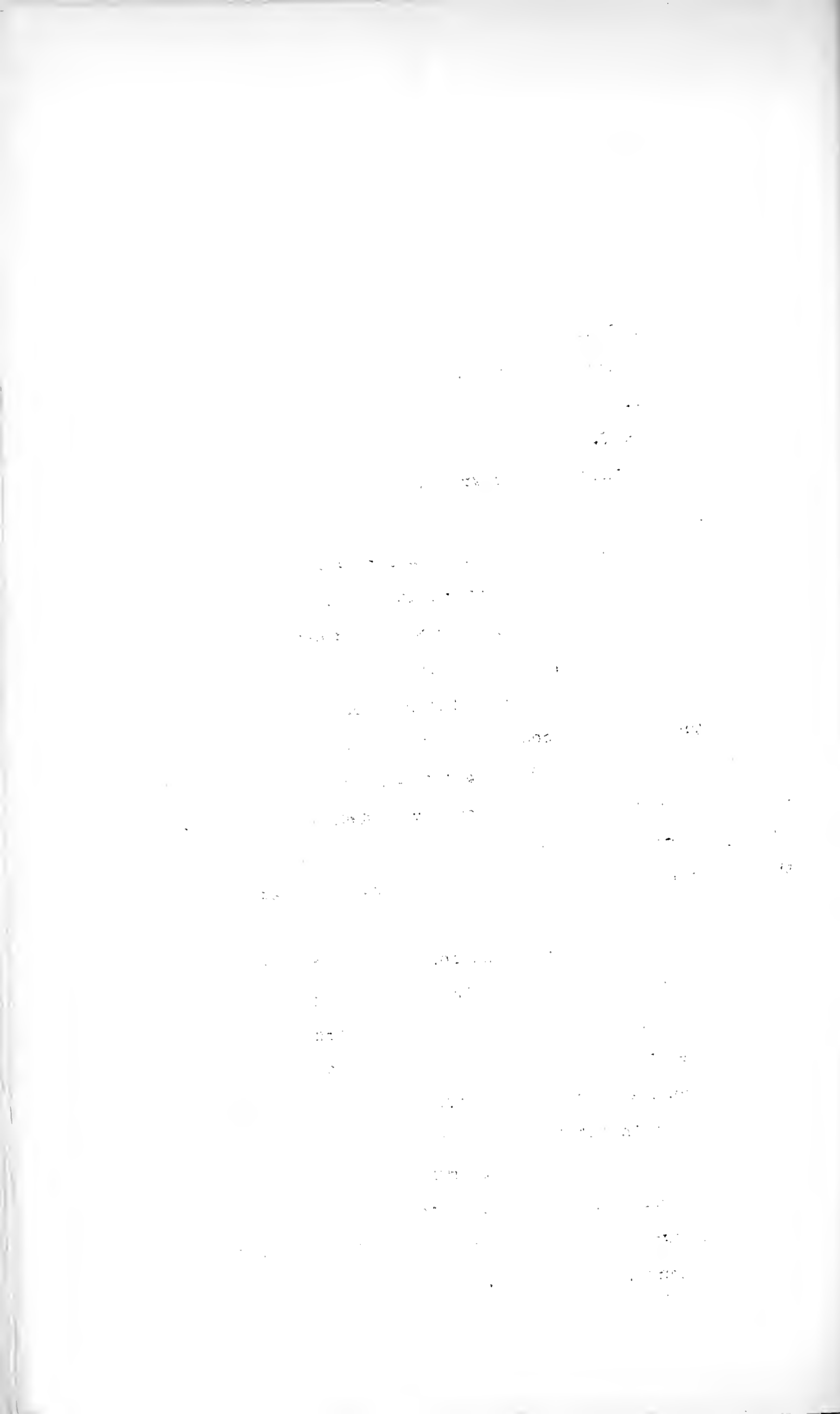
MUNICIPAL COURT

OF CHICAGO

JUDGE FRIEND DELIVERED THE OPINION OF THE COURT.

On information filed in the Municipal Court of Chicago defendant was charged with the crime of assault with a deadly weapon, to-wit, a 1949 Chevrolet automobile, with intent to inflict bodily injury upon one James Holub. Trial by the court without a jury resulted in a finding of guilty, and defendant was fined \$50.00 and costs. Post-trial motions were made and overruled by the court, and judgment was entered upon the finding. Defendant brings this writ of error to review the record of the Municipal Court.

As the sole ground for reversal it is urged by defendant that his automobile was not in itself a deadly weapon, and, therefore, in order to sustain the charge, the use of the automobile as such a weapon must be proved beyond a reasonable doubt. Defendant takes the position that intent is the gravamen of the crime of assault, and that there was no evidence to show that he unlawfully and wilfully intended to inflict bodily injury upon anyone or that he was possessed of "an abandoned and malignant heart," as charged.



From the essential facts adduced upon the hearing it appears that shortly after five o'clock on the afternoon of May 12, 1953, defendant, carrying four passengers, was driving his car in a westbound direction on Diversby Parkway and was stopped for traffic at the Wolcott Street intersection. Stewart-Warner Corporation is located in this immediate area; at this time many of its employees were leaving the plant, and traffic was heavy. While defendant was waiting for the signal to proceed, he blew his horn; there is nothing in the record to indicate such action was justified. Officer Holub, who was directing traffic at the intersection, admonished defendant, explaining that it was illegal to blow his horn under such circumstances, and told him that unless he stopped he would be given a ticket. When Officer Holub went back to his traffic position defendant deliberately blew his horn again. The officer then returned to the car, whereupon defendant said he wanted to know the time; the officer supplied him with this information. When traffic began to move defendant drove by Officer Holub, blowing his horn and, as the officer testified, "made a face at me." The officer blew his whistle, whereupon Officer Zaprzalka, stationed some seventy-five to a hundred feet away, ordered defendant to stop and stepped in front of the car. Defendant ignored the order and continued to proceed, making it necessary for Officer Zaprzalka "to leap out of the way." Another seventy-five or hundred feet away defendant





-3-

again had to stop because of traffic, whereupon Officer Zaprzalka approached the car from the side and Officer Holub from the front. Officer Holub directed defendant to pull over to the curb, but, instead, disregarding the order, defendant started the car, striking Officer Holub, catapulting him onto the hood of the car and carrying him some fifty feet. Meanwhile, Officer Zaprzalka was "in the door [of the car] trying to pull him [defendant] out. He refused to get out of the car and we [the police officers] had to forcibly eject him from the automobile. We got him out on the street and he started to fight and we had to subdue him." Neither the defendant nor any of the passengers in his car testified upon the hearing; the two officers were the sole witnesses.

It was held, in People v. Benson, 321 Ill. 605, that a driver of an automobile may be convicted on a charge of assault with a deadly weapon where the evidence shows beyond a reasonable doubt that his conduct was so reckless, wanton and wilful as to show utter disregard for the safety of others, without regard to whether he had a specific intent to strike or collide with the person injured.

It may be conceded, as defendant argues, that an automobile may be used innocently but in such a manner as to produce bodily injury. The question here presented, however, is whether it was used deliberately and intentionally, as a deadly weapon, to inflict injury. Cases cited by defendant in support of his contention are not applicable



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since the facts indicate negligence rather than wilful and wanton conduct. Upon the record we think the court, who heard and saw the witnesses, was justified in finding that defendant's conduct was reckless, wanton and wilful. Defendant at first contemptuously refused to heed the order of Officer Holub to stop blowing his horn, deliberately drove his automobile at the officer, and then wilfully disregarded his command to pull over to the curb. People v. Dobrovolski (Abst.), 267 Ill. App. 599, where the Benson case is relied upon, enunciates the principle that a driver of an automobile may be convicted of a charge of assault with a deadly weapon, on the showing, beyond a reasonable doubt, that his conduct was so reckless, wanton and wilful as to <sup>indicate</sup> ~~show~~ an utter disregard of the safety of others, notwithstanding the absence of any specific intent to collide with the person struck.

There is the further circumstance that the operator of an automobile should not disregard the signals or instructions of traffic officers in the line of duty. In the instant case defendant, after disregarding the orders of both officers, refused to get out of his car when so ordered and, instead, actually resisted the officers.

In the circumstances we find no convincing ground for reversal, and, accordingly, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

NIEMEYER, P. J., and BURKE, J., CONCUR.



47084

PEOPLE OF THE STATE OF ILLINOIS, }

Defendant in Error, }

v. }

THOMAS E. HAYES, }

Plaintiff in Error. }

13 I.A.<sup>2d</sup> 256

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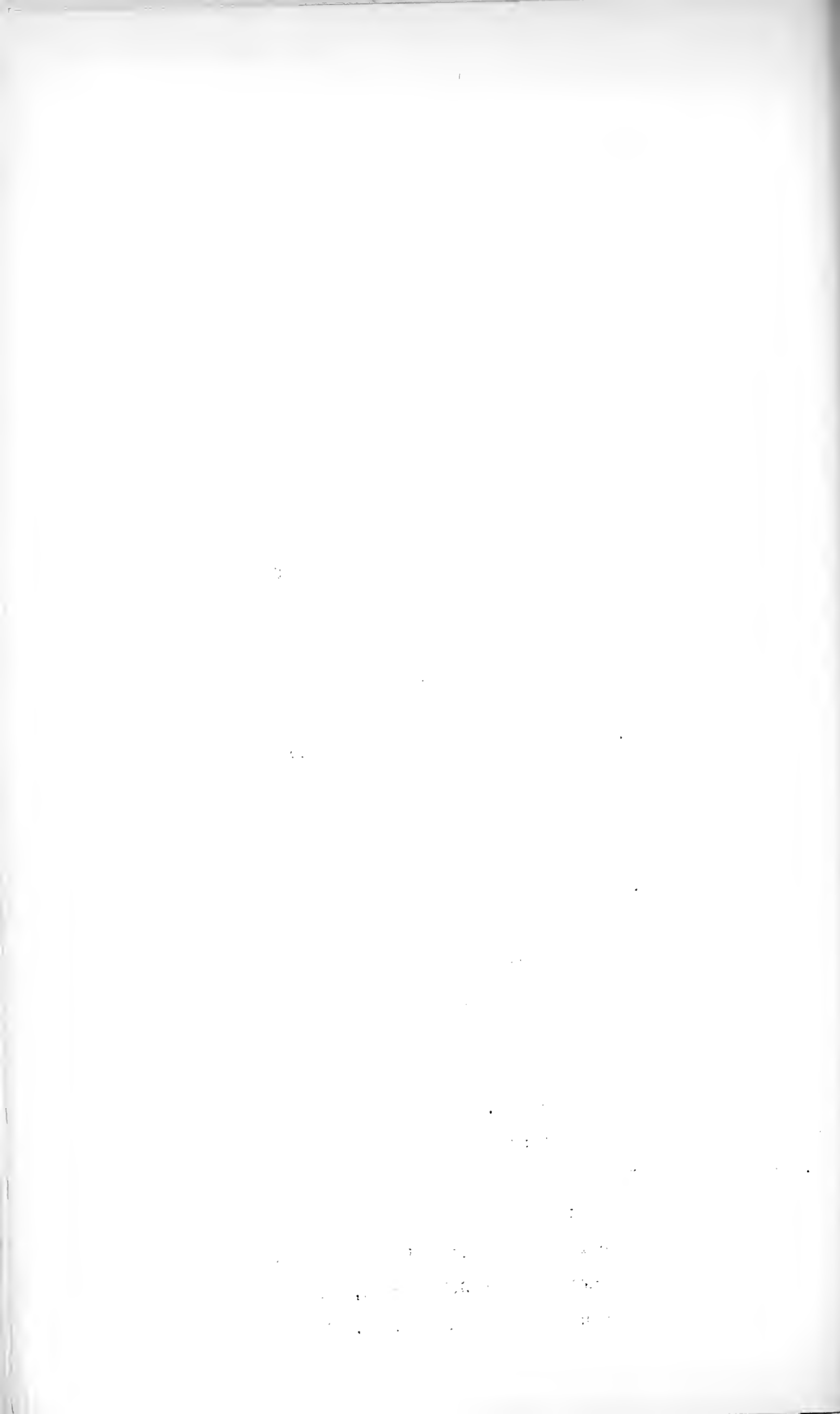
CRIMINAL COURT

COOK COUNTY

JUDGE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant Thomas E. Hayes was tried in the Criminal Court, without a jury, on an indictment charging him with assault with a deadly weapon. He was found guilty and sentenced to the County Jail for a term of six months. This writ of error is brought to review the judgment and sentence imposed.

The facts adduced upon the trial disclose that on October 7, 1955, at about ten-thirty in the evening, Mrs. Mary D. Kelly, the complaining witness, who was the mother of four children and separated from her husband, went with Mrs. Kampo, a neighbor, to a near-by tavern known as Dowd's, where they met Mr. Kampo. They drank beer there until midnight, when Mr. Kampo left the tavern, but the two women stayed on until one o'clock. They then went to Tucker's, another tavern, where they drank beer until two, when Mrs. Kampo discontinued the tavern circuit, while Mrs. Kelly decided to go on to a restaurant for a take-out order of chicken for her father who was taking care of her children. However, she passed McPartlan's Tavern and stopped off, and there met Officer John Green, an acquaintance, who introduced her to defendant. Here she had some more beer.



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Defendant Thomas E. Hayes, twenty-five years old, was a police officer of the City of Chicago, assigned at that time to motorcycle duty in the Fortieth District, on a 4:00 p.m. to midnight schedule. On the night in question he went back to the district station, following the close of his tour of duty, to return his motorcycle, and at the station met Officer John Green. The two officers, still in uniform, went to Blanchette's, a tavern, and then proceeded to McPartlan's Tavern, arriving there about two-fifteen. It was here Mrs. Kelly and Officer Hayes met, through Officer Green, and the three stayed in the tavern, drinking and playing shuffleboard, until four in the morning, when the tavern closed. From there all three, accompanied by Mr. and Mrs. McPartlan and one Edward Garrity, went to the Hickory Pit, a restaurant near McPartlan's, where they remained until six o'clock. On leaving, Officer Green asked defendant to take Mrs. Kelly home. Since her chicken order had not yet been packed, she and defendant waited for it; the others in the party took their leave. After getting her order, Mrs. Kelly, with defendant, left the restaurant, and the two of them went to defendant's car.

Mrs. Kelly stated that after defendant entered the car he attempted to kiss her, whereupon she placed her hand under his chin and pushed him back. She testified that he put his hand in the back of the seat, and then she felt two blows on her head; that when she looked up

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she saw a blackjack in defendant's right hand, with which he struck her seven or eight times; and that she opened the car door and rolled to the curb. Defendant then drove the car away, but not before Mrs. Kelly took note of his license number.

Nick Yokas, a retail grocer, whose day was beginning as Mrs. Kelly's was ending, testified that as he was driving to work he saw a woman on the sidewalk "on one knee trying to get up." This was Mrs. Kelly, whom he befriended in response to her request for help. He noticed that her forehead was bleeding, and he drove her to the police station. There Sergeant Thomas E. Shea, the desk sergeant, radioed for a squadrol to take Mrs. Kelly to the nearest hospital for first aid and, after radioing Acting Lieutenant Rochford, ordered defendant to come to the station. Lieutenant Rochford, upon learning from defendant the location of his parked car and obtaining his keys, in company with Sergeant Shea, went over to Cornelia and Bell avenues to inspect the car. In it they found a woman's purse (which was subsequently introduced in evidence) and saw bloodstains on the passenger side of the car. The purse was identified as the one Mrs. Kelly had carried on the night and morning in question and which belonged to her. Her coat and sweater, which were stained with blood, were also introduced in evidence.

Defendant testified in his own behalf that he was a police officer; that at the termination of his tour of

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duty on the night of October 7, 1955 he returned to the station house, where he met Officer Green; that together they went to Blanchette's Tavern, and then on to McPartlan's, arriving at the latter place about two-fifteen of the morning of October eighth; and that it was there he met Mrs. Kelly, who was introduced to him by Officer Green. Defendant stated that they played shuffleboard and talked. From McPartlan's he, along with a group made up of Mrs. Kelly, Officer Green, Edward Garrity, and the McPartlans, went to the Hickory Pit, a restaurant. There they had something to eat, and, before leaving, Officer Green asked him to drive Mrs. Kelly home. Since Mrs. Kelly was waiting for her chicken order to be made up, she and defendant did not leave the restaurant until about five minutes later than the others in their party. Defendant stated that he and Mrs. Kelly walked toward his automobile, that he opened the door to permit her to enter, and that he then went around to the other side of the car; that before he could get in, she jumped out on the passenger side. He was not in the mood for pursuit--or so his version of the incident ran--and he started his car and went home. He denied that he struck Mrs. Kelly.

In his statement given to his superior officers shortly after the affair, he attributed the bloodstains in his car to scratches on his face and knuckle, whereas later in court he testified that the bloodstains resulted from a nosebleed which followed an automobile accident in which he had been involved on the morning in question and

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which he had reported to his superiors. Defendant's counsel sought to introduce his statement in evidence, but it was excluded by the court as self-serving. Defendant admitted that he had been to <sup>the</sup> various taverns mentioned; in his statement to his superior officers, Hayes stated that he had had "7 or 8 V.O.'s that night," and on examination during the trial he said that he "had been drinking," but that he knew what he "was doing." His counsel argue that defendant was intoxicated to such a degree that he was incapable of entertaining specific intent, and therefore not guilty of the crime charged, citing Schwabacher v. People, 165 Ill. 618, Bruen v. People, 206 Ill. 417, and People v. Klemann, 383 Ill. 236. Whether defendant was so intoxicated as to be incapable of entertaining a specific intent was a question of fact. In People v. Freedman, 4 Ill. 2d 414, defendant was charged with taking indecent liberties with a female child. It was there contended that he was so intoxicated as to not know what he was doing and so lacked the mental capacity to form the specific intent essential to the crime, but the court held there, as it had previously in the Klemann case, that this was a question for the jury. Here defendant, in his testimony, appeared to be positive as to what the complaining witness did when he was taking her home; from this circumstance and other facts in evidence, the trial judge was evidently of the opinion that defendant was sufficiently sober to form a specific intent to commit the crime of assault.



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The defendant contradicted himself, the complaining witness contradicted him; the judge who heard the case said that it was difficult to determine the exact nature of the assault, but he felt sure that there was an assault, and that it represented a conscious and an intentional act on the part of defendant; accordingly, he found defendant guilty and sentenced him to six months' imprisonment. The trial judge who heard the witnesses was in a much better position than are we to assess their credibility. The record justifies his finding, and the judgment should be affirmed; it is so ordered.

JUDGMENT AFFIRMED.

NIEMEYER, P. J., and BURKE, J., CONCUR.

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MARY ROSE SMITH,

Appellant,

v.

PIONEER TRUST & SAVINGS  
BANK, a corporation,

Appellee.

13 I.A.<sup>2d</sup> 424

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE ROBSON DELIVERED THE  
OPINION OF THE COURT.

This appeal is taken from a judgment notwithstanding the verdict entered in favor of the defendant below. The action was one to recover damages for personal injuries sustained by the plaintiff as a result of a fall on the main banking floor of the premises maintained and operated by defendant. Plaintiff alleges that her fall was caused by defendant's negligence. The jury returned a verdict for plaintiff in the amount of \$3,000. Defendant filed a motion for a new trial or in the alternative a motion for judgment notwithstanding the verdict. The trial court failed to rule on the former motion but sustained the latter and on December 29, 1955, entered judgment in favor of defendant and against plaintiff for costs.

The only question presented by this appeal is whether or not all the evidence taken in the light most favorable to plaintiff is sufficient to establish the negligence of defendant as alleged in the complaint. The complaint alleges that defendant had negligently permitted "certain grease, water, polish or other

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slippery material" to remain on the floor causing plaintiff to slip and fall.

The facts are not complicated. On July 3, 1953, plaintiff, a widow seventy-five years old at that time, entered the defendant bank at 1:30 p.m. for the purpose of cashing a check. As plaintiff walked across the central portion of the main banking floor toward tellers' windows twelve and thirteen she slipped and fell. In essence plaintiff alleges that her fall was attributable to the negligence of the defendant in failing to remove from the floor a certain substance used to clean the floor on the previous day. The question presented on these facts is whether or not there was any evidence which might support the inference that some substance used in cleaning the floor had been allowed to remain overnight, thereby creating a slippery patch which caused plaintiff to fall.

Both parties to this action agree to the summary of the legal significance which attaches to the evidence in this type of case as stated in Dixon v. Hart, 344 Ill. App. 432, 436 (1951):

"In our view, the simple legal proposition that crystallizes from the many factual situations giving rise to suits of this nature may be stated thusly: a store owner may treat his floors with wax or oil or other substance in the customary manner without incurring liability unless he is shown to be negligent in the materials he uses or in the manner of applying them."

In that case the plaintiff established only that the floor was "slick" and failed to establish any negligent

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selection or application of the materials which had created that condition. For that reason the court reversed the trial court's denial of defendant's motion for a judgment notwithstanding the verdict. The facts in the instant case differ substantially. Whereas the evidence in the Dixon case indicated that the entire floor had been covered with a coating of wax prior to the plaintiff's fall, the testimony of defendant's own witnesses in the present action indicates that the presence of any grease, polish, or other slippery material on that portion of the floor on which plaintiff fell could be attributed only to negligence in failing to remove from the floor certain matter which had been applied in the normal process of cleaning the floor.

The plaintiff testified that after her fall she noticed a skid mark approximately two feet long next to the spot at which she had come to rest. She stated further that she noticed that the spot where she fell "felt as though it was gritty soap." She further testified that upon arriving home after the fall she found a gritty substance on her elbow which was "sort of soapy." Plaintiff's daughter-in-law testified that she cared for plaintiff when she arrived home after the fall, that plaintiff's arm was covered with a shiny film. A bank officer, called as a witness by plaintiff under Section 60 of the Civil Practice Act, testified that the portion of the bank floor around the tellers' windows was washed



with a soap or detergent when the weather was such that the heavy customer traffic around the windows brought in dirt from outside. He stated that the bank required the floors to be thoroughly rinsed because it would dull the terrazzo if the soap were to remain. (The portion of the floor on which plaintiff fell was terrazzo.) Following this testimony are these questions and answers:

"Q. Have you ever seen the floor when only part was being washed with soap and parts with clear water?

A. That is the customary procedure.

Q. How many times would you say that they wash the floor with soap or detergent?

A. When the floor is dirty, extremely dirty.... They change the water and then go to another portion....

Q. They sprinkle the soap on the area where the dirt is?

A. Yes."

When called as a witness for the defense the same officer for the bank testified on cross-examination that the cleaning women sprinkled a cleaning substance in an area eighteen to twenty inches wide around the three sides of the floor bounded by the tellers' windows. He testified that the mops were eight to ten inches wide and twelve to fourteen inches long, and that when the cleaning women mopped the substance on the floor they would extend the mop as far beyond the area sprinkled as normal arm action would permit. We are of the opinion that this testimony alone is sufficient to permit the

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reasonable inference that a cleaning substance was applied to that portion of the floor on which plaintiff fell, in view of plaintiff's testimony that she was walking between the information desk and the tellers' windows, in the direction of windows twelve and thirteen, and that she fell two to five feet away from the information desk, at a spot not a considerable distance from the tellers' windows.

However, there is further evidence to substantiate this inference. There is the testimony of the cleaning woman who had cleaned the floor on the day preceding plaintiff's fall that she used a detergent every night in an area of two feet or more around the edge of the floor. There is the testimony of the guard on duty when plaintiff fell that plaintiff fell six or seven feet from where he was sitting, east of the information desk; that, although he did not see her fall, he assisted her to her feet, but failed to look at the floor to see what had caused her to fall. We feel that this testimony, taken in the light most favorable to plaintiff, fails to support defendant's contention that a soap or detergent had not in fact been applied to that area in which plaintiff fell.

Our attention has been called to certain inconsistencies between the complaint and a statement given defendant by plaintiff on August 12, 1953, slightly more than a month after the occurrence. This statement was introduced into evidence by reading it into the



record. However, these inconsistencies were matters for the consideration of the jury to which the determinations of ultimate fact were properly submitted.

Summarizing, we feel that there is evidence in the record which tends to support the inference that there was a slippery patch on that portion of the floor on which plaintiff fell. Such a condition could only exist as a result of negligence in cleaning the floor.

The trial court in its order which was entered on December 29, 1955, two days prior to the effective date of the revised practice act, failed to pass on the motion for a new trial. In its failure to insist upon a ruling, the defendant waived its right to a new trial. Fulford v. O'Connor, 3 Ill.2d 490 (1954). Under such circumstances we have no alternative but to enter judgment for plaintiff in the sum of \$3,000, the amount of the verdict of the jury in the trial court.

Judgment reversed and judgment  
entered in this court for  
plaintiff.

Schwartz and McCormick, JJ., concur.

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13 I.A.<sup>2d</sup> 425

IN THE

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APPELLATE COURT OF ILLINOIS

APR 12 1957

SECOND DISTRICT

PAUL V. WUNDER FEBRUARY TERM, A. D. 1957

Clerk Appellate Court Second District

RAY ANGELINI,  
Plaintiff-Appellant,

vs.

ELLA CONSTANCE MOHRMANN, ELIZABETH  
M. BREWER, CATHERINE E. MOHRMANN,  
and ANNA J. MOHRMANN,  
Defendants-Appellees.

Appeal from the  
Circuit Court of  
Lake County.

SOVALDI, --- J.

The plaintiff sought by amended complaint to set aside an execution sale conducted by the sheriff of Lake County and to have the Certificate of Sale decreed to be null and void. The trial court granted the defendants' motion to dismiss the amended complaint, as amended, the plaintiff elected to stand on his amended complaint, as amended, and the trial court entered a final order dismissing the suit for want of equity, and the plaintiff appealed therefrom.

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In the first instance, the court sustained a motion of defendant, appellee, Ella Constance Mohrmann, to dismiss the original complaint, and granted leave to plaintiff to file an amended complaint, and later granted leave to file an amendment to the amended complaint.

The facts alleged in the amended complaint, as amended, are as follows:

That the defendants are the beneficiaries of a trust of which the First National Bank of Lake Forest is trustee under Trust Number 408, and the plaintiff is the owner of a leasehold made May 12, 1954 by and between said First National Bank of Lake Forest as trustee under said trust number 408 and the plaintiff, by which instrument certain premises were conveyed and leased to plaintiff, as lessee, for the period beginning May 15, 1954 and ending May 14, 1959. Under and by virtue of said instrument plaintiff was granted among other things, an option to purchase the premises described therein for the sum of \$40,000.00 by giving written notice at any time during the term of the lease and by the payment of \$10,000.00 to the defendants and the entering into with them of an installment contract as in said lease provided;

That plaintiff was the maker and one or more of the defendants were the payees of a certain judgment note dated April 1, 1954 which was due and payable one year after date in the amount of \$900.00; and that at the time of the making and





delivery of said note it was orally agreed and understood by and between the plaintiff and the defendants that payment thereof would not be demanded until on or about April 1, 1957; but that notwithstanding said oral agreement, the defendant, Ella Constance Mohrmann, caused judgment by confession to be entered on the note, the judgment purporting to be in the amount of \$978.00 plus \$10.00 court costs or a total of \$988.00, and execution thereon was issued on June 1, 1955 and served upon the plaintiff on or about June 25, 1955;

That immediately following the service of the execution upon the plaintiff, the plaintiff went to the home of the defendants to inquire of them as to the meaning of the judgment by confession against him and the service of the execution upon him inasmuch as the defendants had orally agreed at the time of making the note that payment thereof would not be demanded until on or about April 1, 1957; that defendants alleged that the plaintiff was paying other bills but that he had not paid for certain hay that he had been supplied by defendants, and that the plaintiff thereupon agreed to and did subsequently pay the sum of \$45.00 to the defendants for said certain hay that he had theretofore received from the defendants; that the plaintiff explained that he did not have the money with which to pay the note sued upon by the defendant, Ella Constance Mohrmann, but stated that if he had to pay said note, he would borrow the money elsewhere in order to pay said defendant; that said de-

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defendant, Ella Constance Mohrmann, declared she would have to talk to her attorney, Mr. J. E. Bairstow, about payment of said note and to determine whether arrangements would have to be made; that said defendants represented that Mr. J. E. Bairstow was trying to help the plaintiff but that plaintiff had received an erroneous impression of defendants' said counsel; that the plaintiff stated that he did not want to get a lawyer and the said defendants assured the plaintiff that he would not have to go to that expense, and said defendants declared that they did not see why the plaintiff needed a lawyer or why he should have to spend money for that purpose, and that the plaintiff had nothing to worry about; that by reason of said conversations, understanding and assurances the plaintiff departed from the home of the defendants, and thereafter continued to make regular rental payments each month, upon the said lease and option agreement including the period from July through December, 1955, without any notice or advice of any kind from said defendants that they intended to sell, or attempt to sell and convey the said leasehold and option to purchase of the plaintiff;

That the defendants falsely and fraudulently with intent to deceive the plaintiff, and to deprive the plaintiff of his entire right, title and interest in and to the aforesaid leasehold and option agreement, and in violation of their promises and assurances to the plaintiff, planned, and conspired and attempted fraudulently and unlawfully to deprive the plaintiff of his valuable leasehold and option to purchase the afore-



said premises by the void, unlawful, and unconstitutional sale thereof purported to have been held on August 20, 1955 at 10:00 A.M. Central Daylight Saving Time at the East Main Entrance to the Court House, Waukegan, Illinois;

That said defendant, Ella Constance Mohrmann, individually, and in conspiracy with the other defendants herein without any service of notice upon the plaintiff and without the plaintiff's knowledge in said cause number 62364, falsely and fraudulently and with intent to defraud and deprive the plaintiff of his valuable leasehold and option to purchase purported to sell said leasehold interest as personal property, or a chattel real, notwithstanding the valuable option to purchase the land above described, and without reference of any kind to said option, and describing the plaintiff's interests solely as a lease in and to the above described property, and purporting to act in accordance with the provisions of Section 43 of Chapter 77, Ill. Rev. Stat. falsely and fraudulently purported to sell and convey to the defendant, Ella Constance Mohrmann, for a bid of \$200.00 the entire right, title, and interest of the plaintiff under the lease and option agreement the purported certificate of (copy of sale being attached as an exhibit);

That the defendants falsely and fraudulently with the intent to defraud and deprive the plaintiff of his valuable leasehold and option to purchase the aforesaid property and in violation of the statute in such case made and provided, (being Sections 3, 14 and 43 of Chapter 77, Ill. Rev. Stat.)



and without any notice to or knowledge of the plaintiff purported to sell said leasehold and option to purchase; that said purported notices were not published nor delivered to the plaintiff nor posted on the premises subject to the leasehold and option agreement purporting to be sold; that said notices were placed in remote places and places where such notices would not likely be seen nor found by the plaintiff, nor any one in his behalf; that on said date of August 10, 1955, when said notices purported to have been posted, the plaintiff was actively engaged and daily employed in the Kiddieland and amusement park immediately adjacent to the aforesaid premises, and was in daily communication with the tenant, and other persons who were occupying the aforesaid premises as and for a golf driving range and for other related purposes; that one of the purposes of requiring posting of notices under the statute is to advise the owner thereof of the intended sale, and to secure a purchase or purchases of the property subject to the sale for the highest and best price available therefor, but that the defendants falsely and fraudulently and in direct violation of the statutes in such cases made and provided and with intent to deceive and defraud the plaintiff of his valuable leasehold interest and option to purchase pretended to comply with the provisions of Section 43 of Chapter 77, Ill. Rev. Stat. while at the same time depriving the plaintiff of notice or knowledge of their fraudulent and unlawful purposes;





That the defendant, Ella Constance Mohrmann, unlawfully and in violation of Section 14 of Chapter 77, Ill. Rev. Stat. failed to publish or advertise the aforesaid leasehold and option agreement of said premises for sale as therein required, in that said leasehold and option to purchase falls within the definition of "real estate" as set forth and contained in Section 3 of Chapter 77, Ill. Rev. Stat.;

That the value of the leasehold interest of the plaintiff in and to said lease and option agreement dated May 12, 1954, is far in excess of the sum of \$200.00 for which said leasehold interest purported to be sold upon said purported execution sale, and that said leasehold interest and option agreement of the plaintiff has a value in excess of \$10,000.00;

That on February 10, 1956, the plaintiff tendered to the defendant, Ella Constance Mohrmann, the sum of \$1039.85 being the amount of said judgment by confession together with interest up to and including the date thereof, of \$37.05, and the costs and expenses of the Sheriff in conducting said purported sale in the amount of \$14.80, and that in addition thereto, the plaintiff has tendered to all of the defendants herein the amounts of rent due and payable upon said lease and option agreement in the sum of \$75.00 for the period commencing February 15, 1956 but that such tenders having been declined are of no effect, and further tenders of rental payments to the defendants are of no avail and are unnecessary;



That because of the matters set forth in this complaint, the execution sale and Certificate of Sale were and are void and of no force and effect, and that said sale and Certificate of Sale should be set aside and cancelled, and decreed by this court to be of no force and effect;

That at the time of filing the original complaint herein the plaintiff made tender of any and all amounts that were then due to the defendants or any of them, and there was deposited said amounts so due together with subsequent amounts which became due thereafter, said deposits having been made to the clerk of this court.

It is appellant's theory of the case that through the fraud of the defendants he was deprived of valuable interests in real estate, valued at in excess of \$10,000.00 at a grossly inadequate price of \$200.00.

The defendants contend that plaintiff did not assert any defense against the judgment of \$988.00; that plaintiff admitted that the execution upon the judgment was served upon him by the sheriff on June 25, 1955; and that the sheriff posted notices of the sale in three places on August 10, 1955, ten days prior to the sale, as evidenced by the sheriff's notice of sale and his certificate of posting attached to the amended complaint as exhibits; and that equity will not relieve the plaintiff from the consequences of his own neglect; and that the amended complaint, as amended, does not state a cause of action and fails to disclose any cause for equitable



relief; that factual requirements must be made before equity will intervene and that an executed sale will not be set aside in the absence of fraud or some irregularity in the proceedings.

A motion to dismiss is in the nature of a demurrer and as such is said to admit for the purposes of argument all material facts well pleaded contained in the pleadings to which it is directed. 41 Am. Jur., Pleading, Secs. 330 and 332, pages 517 and 518; Schroer v. Pettibone, 163 Ill. 42. In the latter case the court said, at page 44:

"While the cross-bill is by no means a model of good pleading, we think it is sufficiently alleged that the \$3000 judgment was recovered upon a false and fictitious demand by the fraud of appellant, in the absence of Pettibone and without his knowledge, upon constructive service, merely. In such a case equity will interfere to prevent the enforcement of such a judgment. (Ogden v. Larrabee, 57 Ill. 389; 12 Am. & Eng. Ency. of Law, 142.) We must, of course, decide the case upon the pleadings. It might be that upon a hearing upon the evidence no fraud would appear, but it is so alleged, and upon the admission of the demurrer it must be so held."

With other matters, it is alleged in the amended complaint, as amended, that the entry of the judgment by confession against the plaintiff and the sale and the purchase of his leasehold interest and option to purchase were the result of fraud by the defendants. Admitting facts well pleaded, it would seem that the allegations are sufficiently set forth to entitle plaintiff to a hearing on the merits.

In Barnes v. Freed, 342 Ill. 73, at page 76, the court said:

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CHICAGO, ILL. 60637

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"In this case property worth approximately \$20,000 was sold for \$917.59. The consideration was grossly inadequate. It has long been the rule in this State that while gross inadequacy of price is not of itself sufficient to set aside a judicial sale, yet such inadequacy, coupled even with slight circumstances indicating unfairness or fraud, either upon the part of the officer, the purchaser or the party to the record benefited by the sale, will furnish sufficient ground for equitable intervention. Under such circumstances the purchaser at a judgment sale can retain his advantage only by showing that he acquired his title by proceedings free from fraud or irregularity."

In *Block v. Hooper*, 318 Ill. 182, at page 185, the court said:

"If the inadequacy can in any way be traced to, connected with or shown to result from any mistake, accident, surprise, misconduct, fraud or irregularity the sale will generally be vacated. All facts which tend to show that any unfair advantage was sought by the purchaser or person benefited by the sale are competent to be considered and may amount to evidence of fraud."

To the same effect is *Rogers v. Barton*, 386 Ill. 244; *Magnes v. Tobias*, 337 Ill. 605; *Giegg v. Christensen*, 346 Ill. 314; *Hamilton v. Quimby*, 46 Ill. 90; *McDaniel v. Wetsel*, 264 Ill. 212; *VanGundy v. Hill*, 262 Ill. 162.

In the present case it is alleged in the amended complaint, as amended, that after the execution was issued on the judgment by confession and served upon the plaintiff, the plaintiff went to the home of the defendants to inquire of the meaning of the judgment and service of execution because defendants had orally agreed at the time of the making of the note that payments would not be demanded until on or





about April 1, 1957 and plaintiff explained to them that he did not have the money with which to pay the note sued upon, but that if he had to pay the note he would borrow the money with which to do so; that the defendant, Ella Constance Mohrmann then advised plaintiff that she would have to consult with her attorney about payment of the note and to determine whether arrangements would have to be made; that plaintiff then stated that he did not want to get a lawyer; that the defendants told the plaintiff that they did not see why the plaintiff needed a lawyer; and that the defendants then assured the plaintiff that their attorney was trying to help the plaintiff, that the plaintiff had nothing to worry about, and that there was no need for the plaintiff to spend money for the purpose of getting a lawyer. The amended complaint, as amended, alleged further that by reason of these representations and assurances on the part of the defendants, the plaintiff departed from the home of the defendants, and thereafter continued to make regular rental payments each month upon the lease and option agreement including the period from July through December, 1955 without any notice or advice of any kind from said defendants that they intended to sell, or attempt to sell and convey the said leasehold and option to purchase of plaintiff.

Plaintiff contends that by their misrepresentations, defendants nullified the effect of the service of execution upon him. In this connection the court stated in *Barnes v.*



Freed, supra, at page 61:

"The purpose of notice of service of an execution is to give the debtor a chance to pay or make claim of exemption before further proceedings are had. Appellee in this case was able to pay, and tendered the amount of the judgment, interest and all costs before bringing this action. It is but equitable that she be given an opportunity to redeem."

The lower court erred in its ruling on the motion, and its order must be set aside. The cause is remanded to the circuit court of Lake County with directions to vacate the order dismissing the action and to require the defendants to answer the amended complaint, as amended.

Reversed and remanded.

Wm C. J. Concors

Crow, J. Concors

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APR 12 1957

PAUL V. WUNDER  
Clerk Appellate Court Second District

46992

ALEC SHATZ,

Appellee,

v.

AARON K. PAUL, SEYMOUR HIRSCHFELD  
and HAROLD HIRSCHFELD, copartners,  
doing business as EMPIRE FACTORS,

Appellants.

13 I.A.<sup>2d</sup> 426

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

JUDGE McCORMICK DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Cook County making permanent a temporary injunction heretofore issued in this cause.

Alec Shatz, hereafter referred to as plaintiff, had on March 10, 1955 filed an amended complaint for injunction in the Circuit Court of Cook County against Aaron K. Paul, Seymour Hirschfield and Harold Hirschfield, copartners, doing business as Empire Factors, hereafter referred to as the defendants. In the complaint plaintiff alleged that the defendants had previously filed four actions against him in the Circuit and Superior Courts of Cook County predicated upon fraud and deceit; that the defendants had alleged in those actions that plaintiff had induced them to purchase and discount certain accounts receivable on false representations and warranties made to them and on which they relied; that each of the suits is based upon an invoice made to a different company; that at the time each of the complaints was filed the defendants submitted an affidavit for the procuring of an order for the issuance of a capias ad respondendum and in that



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affidavit it was alleged that Paul and his partners feared that Shatz would leave the jurisdiction of the court if the action was commenced by summons alone; that a capias was issued in each case and bail posted in the total amount of \$13,000; that the aggregate amount of the invoices sued on is \$6,194. In the complaint for injunction the plaintiff further alleges that he, as an officer of the Lynn Pump Company and the A & S Supply Company, Inc., had presented invoices of the corporations to the defendants for the purpose of discounting the same, and that since that time both said corporations had filed voluntary petitions in bankruptcy; that the defendants have in their possession six other invoices due and owing from the bankrupt corporations to them, and the defendants, through their agents and attorneys, threatened to file a separate suit on each and every invoice and secure writs of capias ad respondendum and compel the plaintiff to post bond for his release; that the defendants had no reason to believe that the plaintiff would leave the jurisdiction of the court, as they had asserted in their affidavits; that the plaintiff had no such intention; that the writs were sued out for the purpose of harrassing plaintiff and his wife in order to compel them to make payment; that the defendants' threats to have further writs issued in the separate suits based on the remaining invoices were made to the end that the plaintiff or his wife would borrow funds from friends or relatives and pledge their personal credit towards the payment of the debts occasioned





-3-

by the said unpaid invoices; and that the plaintiff has a good and meritorious defense to all causes of action brought or threatened to be brought by the defendants.

A motion to strike the amended complaint was overruled by the trial court and upon the plaintiff filing bond a temporary injunction was issued forbidding the defendants from suing out any writs of capias ad respondendum on any of the other invoices in their possession sold them by the A & S Supply Company, Inc. or the Lynn Pump Company. From these orders of the court defendant Aaron K. Paul took an appeal, and in Shatz v. Paul, 7 Ill. App.2d 223, we held that the amended complaint stated a cause of action upon which a court of equity may act, inasmuch as the complaint alleged that the writs were sued out with the intention of harrassing the plaintiff and his wife and compelling them to borrow funds or pledge their personal credit towards the payment of monies advanced by the defendants in discounting the invoices presented to them by the plaintiff and that the defendants had in their possession other invoices upon which they threatened to file separate suits and obtain separate additional writs of capias ad respondendum directed against the plaintiff. We held that the complaint set up sufficient facts to show an attempted abuse of process, and that the temporary injunction was properly issued in order to hold the matter in status quo until a full hearing was had.

The defendants thereupon filed an answer. In their answer the defendants admit that they had filed affi-



-4-

davits stating that they feared the plaintiff would leave the jurisdiction of the court, and further state that they still fear that unless the plaintiff is put under bail in each suit filed against him for fraud and deceit he will flee the court's jurisdiction. They also admit that they have other causes of action for fraud and deceit against the plaintiff and his wife; and assert that each false and fraudulent representation made by the plaintiff constitutes a separate cause of action on each of which actions the defendants have a legal right to commence a separate suit.

A hearing was had before the court on the complaint and answer. At the hearing defendant Paul was examined by the plaintiff under section 60 of the Civil Practice Act of Illinois. He testified that he had no factual information that the plaintiff might leave the jurisdiction of the court and that the only information he had to that effect was from his counsel, on whose advice he had acted. He also testified, in answer to a question as to whether or not he had on hand certain invoices given to him by the A & S Supply Company, Inc., the Lynn Pump Company, Alec Shatz or Charlotte Shatz, which have not been paid, that he had a large volume of papers including some unpaid invoices, which he turned over to his attorney to do what he thought was best under the circumstances.

The issues which the trial court had to determine were: Did the defendants have in their possession unpaid invoices which were discounted by the defendants in



-5-

reliance upon allegedly false representations? Did the defendants propose to bring separate suits upon each of the invoices in their possession and seek a capias ad respondendum against the plaintiff in each of such suits? Would the action of the defendants, in case they had so proceeded, have been in good faith, or was it for the purpose of harrassing the plaintiff in order to compel him to make a settlement with the defendants? The factual questions before the court as to the existence of the unpaid invoices in the hands of the defendants and as to their intention to bring separate suits upon each invoice and seek in each a capias ad respondendum directed against the plaintiff were admitted by the pleadings and confirmed by the testimony of defendant Aaron K. Paul on the witness stand. The further question for the court to determine was whether or not the actions of the defendants in seeking the writs of capias ad respondendum were in good faith or were intended as a means of harrassment. The court had before it the admitted conduct of the defendants in the other four suits. It also had the statement of Paul on the witness stand that he had, without any basis except that his attorney had so advised him, signed the affidavits which stated that he feared the plaintiff would leave the jurisdiction.

It is the rule that where anticipated unlawful acts of the defendant are relied on as grounds for the issuance of an injunction, the act to be enjoined must be



-6-

one which is actually threatened and may be expected with reasonable certainty if not prevented by an injunction issued out of the court. That the intention of the defendants was to file separate suits in fraud and deceit on the unpaid invoices in their possession and seek separate capiases upon the filing thereof is an admitted fact. The court could properly find from the previous conduct of the parties and from the testimony of Paul on the hearing that the defendants' anticipated actions would be for the purpose of harrassing the plaintiff and constitute an abuse of process; and upon so finding, under the decision in Shatz v. Paul, supra, the court had a right to make the injunction permanent. The defendants saw fit to introduce no evidence.

Under the pleadings an issue was made as to whether the Lynn Pump Company was a corporation. No evidence was heard on this issue. It is our opinion that the statements in the complaint concerning it were merely pleaded as matters of inducement, and the existence or nonexistence of a corporation known as the Lynn Pump Company was not material to the issues presented in the hearing before the trial court.

The decree of the Circuit Court of Cook County is affirmed.

Decree affirmed.

Robson, P. J., and Schwartz, J., concur.





46965

NELLIE WARSHAWSKY,

Appellee,

v.

AMERICAN AUTOMOTIVE PRODUCTS  
CO., an Illinois corporation,  
Appellant.

13 I.A.<sup>3d</sup> 427

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

JUDGE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff confessed judgment for rent pursuant to the provisions of a lease, and thereafter defendant petitioned the court to open the judgment. The court heard the case upon the petition with exhibits attached and denied defendant's motion, from which order an appeal has been taken. A previous confession of judgment for rent due pursuant to the same lease but for a preceding period was before this court and was decided November 27, 1956 (Warshawsky v. American Automotive Products Co., 12 Ill. App.2d 178). No motion was made to consolidate the two cases, and the matter of the second pending appeal was not called to our attention. The opinion in the former case covers all the points raised on the current appeal, and that decision controls.

The lease in question provided that the leased property was to be used for "manufacturing, assembling and shipping of automotive parts, and for no other purpose whatever." This, defendant contends, was contrary to the provisions of the zoning ordinance. As we pointed out in our previous opinion, the zoning ordinance here applicable permits many uses which would

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MICHAEL H. W. CHEN

*Journal of Management Education* 30(6)p. 789-804

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10

1. *Pharmaceutical industry* – The pharmaceutical industry is the largest of the three industries, with sales of \$10.5 billion in 1997. It is the only industry that has not experienced a decline in sales since 1990. The industry is dominated by a few large firms, with the top five firms accounting for 40% of sales. The industry is highly competitive, with many firms competing for market share. The industry is also highly regulated, with the FDA overseeing the approval of new drugs.

100-443887-100

1. *Phragmites* (Common Reed)

<sup>a</sup> The number of subjects who were included in each group was 10.

Figure 1. The effect of the concentration of the  $\text{Fe}^{2+}$  solution on the adsorption of  $\text{Fe}^{2+}$  by the  $\text{Fe}^{2+}$ -loaded adsorbent. The concentration of the  $\text{Fe}^{2+}$  solution was 0.01, 0.02, 0.05, 0.1, 0.2, 0.5, 1, 2, 5, 10, 20, 50, 100, 200, 500, 1000, 2000, 5000, 10000, 20000, 50000, 100000, 200000, 500000, 1000000, 2000000, 5000000, 10000000, 20000000, 50000000, 100000000, 200000000, 500000000, 1000000000, 2000000000, 5000000000, 10000000000, 20000000000, 50000000000, 100000000000, 200000000000, 500000000000, 1000000000000, 2000000000000, 5000000000000, 10000000000000, 20000000000000, 50000000000000, 100000000000000, 200000000000000, 500000000000000, 1000000000000000, 2000000000000000, 5000000000000000, 10000000000000000, 20000000000000000, 50000000000000000, 100000000000000000, 200000000000000000, 500000000000000000, 1000000000000000000, 2000000000000000000, 5000000000000000000, 10000000000000000000, 20000000000000000000, 50000000000000000000, 100000000000000000000, 200000000000000000000, 500000000000000000000, 1000000000000000000000, 2000000000000000000000, 5000000000000000000000, 10000000000000000000000, 20000000000000000000000, 50000000000000000000000, 100000000000000000000000, 200000000000000000000000, 500000000000000000000000, 1000000000000000000000000, 2000000000000000000000000, 5000000000000000000000000, 10000000000000000000000000, 20000000000000000000000000, 50000000000000000000000000, 100000000000000000000000000, 200000000000000000000000000, 500000000000000000000000000, 1000000000000000000000000000, 2000000000000000000000000000, 5000000000000000000000000000, 10000000000000000000000000000, 20000000000000000000000000000, 50000000000000000000000000000, 100000000000000000000000000000, 200000000000000000000000000000, 500000000000000000000000000000, 1000000000000000000000000000000, 2000000000000000000000000000000, 5000000000000000000000000000000, 10000000000000000000000000000000, 20000000000000000000000000000000, 50000000000000000000000000000000, 100000000000000000000000000000000, 200000000000000000000000000000000, 500000000000000000000000000000000, 1000000000000000000000000000000000, 2000000000000000000000000000000000, 5000000000000000000000000000000000, 10000000000000000000000000000000000, 20000000000000000000000000000000000, 50000000000000000000000000000000000, 100000000000000000000000000000000000, 200000000000000000000000000000000000, 500000000000000000000000000000000000, 1000000000000000000000000000000000000, 2000000000000000000000000000000000000, 5000000000000000000000000000000000000, 10000000000000000000000000000000000000, 20000000000000000000000000000000000000, 50000000000000000000000000000000000000, 100000000000000000000000000000000000000, 200000000000000000000000000000000000000, 500000000000000000000000000000000000000, 1000000000000000000000000000000000000000, 2000000000000000000000000000000000000000, 5000000000000000000000000000000000000000, 100, 200, 500, 1000, 2000, 5000, 100, 200, 500, 1000, 2000, 5000, 100, 200, 500, 1000, 2000, 5000, 100, 200, 500, 1000, 2000, 5000, 100, 200, 500, 100000000

1. *Journal of the American Medical Association*, 1997; 277: 103-107.

From the above it can be seen that the following conditions are satisfied:

...and the fact that the *Journal of the American Medical Association* is the most widely read journal in the United States.

[illegible]

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840.

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the same way as the other two, or as a separate line.

*Journal of Interpersonal Violence* 26(10)

Department of Psychology, University of Maryland, College Park, MD 20742

... and the fact that the hotel is so close to the beach is a great advantage.

-2-

be within the commonly accepted meaning of the language in the lease.

Defendant argued in the previous case and now argues that "automotive parts" is a technological term, to be distinguished from accessories. No proper basis is set forth in the complaint for applying any other than the commonly accepted meaning, but we pointed out in the previous decision that even if we adopted this distinction, there would still be many automotive parts within the purposes of the lease. Therefore it did not appear to us then and does not now appear that the lease was in violation of the zoning ordinance.

Defendant seeks to avoid the commonly accepted meaning of the words describing the purposes for which the premises were to be used by stating vaguely some sort of understanding with lessor as to the usage for which the property was to be put. In its original petition in the earlier case defendant merely stated that it set up manufacturing operations and continued manufacturing until it was informed that this was contrary to the zoning ordinance. It then stated that lessor knew or should have known that the zoning ordinance prohibited the use of the premises for the manufacture of automotive parts. It amended this petition to read that it entered into possession and set up its operations of manufacturing universal joints and parts, using heavy equipment, and then averred that this use was known to lessor at the time



of entering into the lease. In the instant case defendant states that the use was told to lessor and known by lessor at the time of entering into the lease. As we stated in the earlier case, the lease was a definitive and formal contract setting forth all the covenants and agreements of the parties, and these averments so vaguely made would not warrant the court's restricting the term "automotive parts" to the business defined as having been told to lessor.

In our previous opinion we stated we must assume that defendant knew the law. We cited Kazwell v. Reynolds, 250 Ill. App. 174. To this should now be added the recent case of Watters v. Schulz, 10 Ill. App.2d 212. If both parties knew the proposed usage was contrary to the zoning ordinance, the only conceivable reason for execution of the lease by defendant was its belief that operation of the premises could be brought within the law. This could quite plausibly be based upon the prospect of obtaining a variation and, as we pointed out in the previous case, in this respect zoning laws are unique and variations are frequently allowed.

We believe that all points made by defendant are fully discussed and decided in the previous opinion, 12 Ill. App.2d 178.

Judgment affirmed.

Robson, P. J., and McCormick, J., concur.



A

46980

13 I.A.<sup>24</sup> 427

AUBREY J. GREENBERG,

Appellant,

v.

HAROLD F. BIRNBERG,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff, an architect, entered into a written contract with defendant, which provided that upon the completion of preliminary drawings for the construction of a residence, defendant was to pay \$750 and a balance of \$1250 upon the completion by plaintiff of working drawings and specifications to be submitted and accepted by defendant in writing. The contract further provided that the cost of construction was not to exceed \$30,000. Defendant paid the \$750 to plaintiff. This action was for the balance claimed due. The cause was heard without a jury, resulting in a finding and judgment for defendant. Plaintiff appeals.

It appears from the evidence that when the working drawings and specifications were completed, plaintiff solicited bids and procured from a general contractor a bid of \$41,500, which defendant refused to accept, insisting upon the requirement in the contract that the cost was not to exceed \$30,000. Plaintiff revised the working drawings and specifications to reduce the cost of construction. The revised drawings and specifications were submitted to defendant, who advised plaintiff that they appeared to be all right, but that plaintiff should ascertain the cost. Thereupon plaintiff secured





-2-

another bid from the contractor who originally bid \$41,500, reducing its bid based on the specified changes to \$35,600. This bid defendant also rejected, reminding plaintiff that the contract limited the cost to \$30,000. Thereupon plaintiff further revised the specifications, which he transmitted to defendant, advising him by letter that upon the latter revised specifications he had obtained bids totaling \$29,650. These bids, however, which plaintiff claimed in his letter he had, were not submitted to defendant for his examination. It was then that defendant rejected the last revision of the specifications and notified plaintiff of the cancellation of the contract, because of the long delay incurred by plaintiff and the failure of plaintiff to finally submit working drawings and specifications acceptable to defendant.

Defendant's theory is that he never accepted in writing, as required by the contract, final working drawings and specifications. When the first revised working drawings and specifications were submitted to defendant, he notified plaintiff that they seemed all right, but that he wanted plaintiff to ascertain what the cost would be upon this revision. This does not constitute the acceptance contemplated by the contract. The court sustained defendant's theory and we think correctly so upon the evidence before him. Plaintiff failed to prove performance in accordance with the contract, and the court was justified in finding for the defendant.

The judgment is affirmed.

AFFIRMED.

KILEY, J., CONCURS.

LEWE, J., TOOK NO PART.

[illegible]

A

46986

13 I.A.<sup>2d</sup> 428

|                                      |   |                 |
|--------------------------------------|---|-----------------|
| N. FLYER & SON, INC., a corporation, | ) | APPEAL FROM     |
| Plaintiff - Appellee,                | ) |                 |
| v.                                   | ) | MUNICIPAL COURT |
| RABBI LOUIS N. LEVY,                 | ) |                 |
| Defendant - Appellant.               | ) | OF CHICAGO      |

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal Court denying defendant's motion to open a judgment for \$1,198.17 previously confessed against him in favor of plaintiff upon a judgment note. Defendant has appealed.

Defendant employed plaintiff as general contractor under an oral agreement for construction of a synagogue. Disputes arose between them. On June 17, 1955, plaintiff and the "owners", defendant and his wife, entered a written agreement in which plaintiff assigned the subcontracts to the "owners" who undertook construction of the building. The "owners" agreed to pay subcontractors for labor and materials and to indemnify plaintiff against loss arising out of the assignment. Plaintiff agreed to render supervisory help not to exceed \$2,000 and to aid without cost the "owners" wherever possible. He also guaranteed completion of two subcontracts in accordance with specifications. Subsequently on August 10, 1955, a note for \$1,062.55 signed by defendant was given plaintiff. That note is the subject of this controversy.

Judgment was confessed November 22, 1955, but defendant's petition to open was not made until January 20, 1956. The question is whether the trial judge abused his

2351

discretion in refusing to open the judgment for a hearing on the merits.

Municipal Court Rule 2, §23 (2) requires a motion to open a judgment to be supported by affidavits, as provided by Rule 2, §15 for summary judgments, showing a prima facie defense. Section 15 requires the affidavit to set forth "with particularity the facts on which the action is based \* \* \*, facts admissible in evidence."

The facts stated in defendant's petition must be taken as true, but the petition is to be construed most strongly against the petitioner, on the theory that he will state the facts as strongly as the evidence will show. Automobile Supply Co. v. The Scene-in-Action Corp., 340 Ill. 196, 203. The petition states that the note was given "under unlawful compulsion" and without consideration. Defendant seeks to support this conclusion by alleging that the June 17th agreement settled fully all controversies and resolved and adjusted all rights between the parties; that plaintiff refused to comply with the terms of the contract; that "various subtrades" refused to perform "unless and until" defendant made "additional arrangements" to pay plaintiff for "certain \* \* \* masonry work"; that defendant was requested to pay plaintiff \$1,000 and upon his refusal to do so the note was demanded, and that "plaintiff threatened" unless the note was given the building would not be completed. The final allegation is that "no other subtrades would, under union rules and trade agreements take over said construction."

The first part of the paper discusses the importance of maintaining accurate records of all transactions. It is essential for the business to have a clear and concise record of all income and expenses. This will allow the business to track its financial performance over time and identify areas for improvement. The second part of the paper discusses the importance of maintaining accurate records of all assets and liabilities. This will allow the business to track its net worth over time and identify areas for improvement. The third part of the paper discusses the importance of maintaining accurate records of all taxes paid. This will allow the business to track its tax liability over time and identify areas for improvement. The fourth part of the paper discusses the importance of maintaining accurate records of all debts. This will allow the business to track its debt liability over time and identify areas for improvement. The fifth part of the paper discusses the importance of maintaining accurate records of all equity. This will allow the business to track its equity over time and identify areas for improvement. The sixth part of the paper discusses the importance of maintaining accurate records of all other financial information. This will allow the business to track its overall financial performance over time and identify areas for improvement.

-3-

This allegation is not connected with the phrase "plaintiff threatened" which was inserted in the typed petition in handwriting.

The agreement of June 17, 1955, annexed to the petition, does not expressly purport to settle all existing claims; nor does it mention payment for work already done. It appears to be a mere assignment of subcontracts with provision for indemnity, and plaintiff's guaranties and its promise to help defendant.

In asserting that plaintiff wrongfully claimed payment for masonry work defendant neither denies that the work was done nor alleges that it was already paid for. He does not state which subcontractors refused to perform and why; or whether the refusals were written or oral, and if oral whether they were made in the presence of an authorized agent of plaintiff. There is no specific statement of what plaintiff threatened to do and whom he threatened. There is no allegation stating who demanded the note or explaining why if a \$1,000 note was demanded, the note was made in the amount of \$1,062.55.

The trial court was not required to search for inferences of facts. They must be stated with particularity, under Rule 2, §23 (2). This court in Ryniecki v. Sipiora, 9 Ill. App.2d 567, considered the Sipioras' affidavit stating that they lacked knowledge of the note supposedly signed by them, and that if they did sign it, they did so in the belief that they were signing some other kind of instrument. That was held insufficient to meet the requirements of the

The first part of the paper is devoted to a general discussion of the problem. It is shown that the problem is of great importance in the theory of the structure of the atom. The second part is devoted to a detailed discussion of the problem. It is shown that the problem is of great importance in the theory of the structure of the atom. The third part is devoted to a detailed discussion of the problem. It is shown that the problem is of great importance in the theory of the structure of the atom. The fourth part is devoted to a detailed discussion of the problem. It is shown that the problem is of great importance in the theory of the structure of the atom. The fifth part is devoted to a detailed discussion of the problem. It is shown that the problem is of great importance in the theory of the structure of the atom. The sixth part is devoted to a detailed discussion of the problem. It is shown that the problem is of great importance in the theory of the structure of the atom. The seventh part is devoted to a detailed discussion of the problem. It is shown that the problem is of great importance in the theory of the structure of the atom. The eighth part is devoted to a detailed discussion of the problem. It is shown that the problem is of great importance in the theory of the structure of the atom. The ninth part is devoted to a detailed discussion of the problem. It is shown that the problem is of great importance in the theory of the structure of the atom. The tenth part is devoted to a detailed discussion of the problem. It is shown that the problem is of great importance in the theory of the structure of the atom.



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rule. While the facts there were somewhat different, that decision is a practical application of the rule that the motion must state facts showing a prima facie defense. The instant defendant's petition was insufficient to show "business compulsion" and we hold that there was no abuse of discretion in denying his prayer.

It is also claimed by plaintiff that defendant was wanting in diligence in presenting this motion. In the view that we take of this case it is unnecessary to rule on this point.

AFFIRMED.

FEINBERG, P.J., CONCURS.

LEWE, J., TOOK NO PART.



Abstract

A

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

February Term, A. D. 1957.

General No. 10103

Agenda No. 6

Bertha Graff,

Plaintiff-Appellee,

vs.

Harvey J. Graff,

Defendant-Appellant.

13 I.A.<sup>2d</sup> 429

Appeal from  
Circuit Court of  
Tazewell County.

REYNOLDS, P. J.

This is an appeal from a separate maintenance decree entered in the Circuit Court of Tazewell County in conformity with the Master in Chancery's report finding that the defendant, Harvey J. Graff, was guilty of such misconduct as to justify the plaintiff, Bertha Graff, in living separate and apart from the defendant. The decree ordered the defendant Harvey J. Graff to pay to the plaintiff the sum of \$150.00 a month for her support and maintenance, the sum of \$100.00 per month for the support of Gerald Graff, a minor, and the sum of \$100.00 per month for the support of Patricia Graff, the other minor child, as long as each child remains a minor, or unless

Abstract

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otherwise ordered. The decree further ordered the defendant to pay to the plaintiff the sum of \$2675.00 as additional attorney's fees and also that the defendant pay the Master in Chancery fees and the costs of suit. From that decree the defendant appeals to this court.

The plaintiff and defendant were married in 1920 and lived together as man and wife until November 1951. There were nine children born to this union, eight of whom still survive. Of these nine children, two of them, Gerald Graff and Patricia Graff, are minors, Gerald being 17 years of age, and Patricia 16 years of age. In November, 1951 the defendant left their home, and the suit was filed a short time later. The defendant then returned to the home, and in April 1952, the plaintiff left, taking the two minor children with her, and moved to Normal, Illinois, where she lived until June of that year and then moved to her present place of residence at Washington, Illinois.

The evidence shows that Mrs. Graff, the plaintiff, has title to some 507 acres of land in Tazewell County and McLean County in Illinois. The title to this property was conveyed by the defendant to the plaintiff in 1946, but the defendant received the income from these farms and paid the costs of operation until 1951. There was a mortgage on one of the farms of approximately \$20,000.00, and the defendant paid the annual payments on this mortgage until April 1952. In addition to owning the farms, the plaintiff also owns or



has the equitable title to the home where she is now living with a \$13,000.00 mortgage on it. The evidence shows that the 507 acres of land owned by the plaintiff has an approximate value of \$250,000.00. There is one loan of \$17,500.00 and another of \$8500.00 on these farms. In addition, she also has loans of approximately \$10,000.00 that she is paying off. The defendant owns 326 acres of land which is worth approximately \$163,000.00, is practically the sole owner of the Graff Implement Company with a net worth of approximately \$90,000.00 and the company owes him \$50,000.00. There is some question from the evidence as to the equitable title to the 507 acres, and there was some testimony that there was a pending suit over the ownership of these 507 acres.

There does not seem to be any question that the defendant became infatuated with the other defendant, Gladys Gembeling, and was guilty of such conduct that would justify the entry of the decree for separate maintenance. In the brief of the defendant we find this language: "We do not question the finding and decree of the court that Bertha Graff is living separate and apart from her husband Harvey J. Graff without her fault."

The appeal raises these points:- 1. That the decree should not have awarded the plaintiff alimony in the amount of \$150.00 a month for the reason that the net worth and net income of the plaintiff is approximately the same as that of the defendant. 2. That the court erred in ordering the defendant to pay the sum of \$2675.00 as additional

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attorney's fees. 3. That the court erred in ordering the defendant to pay \$100.00 a month for the support and maintenance of each of the two minor children without awarding the custody of said children to the plaintiff.

In considering the first point, it must be conceded that the plaintiff owns property in excess of \$200,000.00.

If the yardstick to be used on whether or not to award alimony or support money, is whether or not the party asking alimony is able to support herself out of her own resources, then this plaintiff is financially able to pay for her own support and that of her children. On the other hand, the defendant is also well able to pay for the support of this wife and his children. Defendant cites the case of Harding v. Harding, 144 Ill. 588 in support of his contention that where the wife is found to have sufficient separate property or means of her own to provide for her separate maintenance, no alimony, temporary or permanent will be awarded her. But a careful reading of that case does not support this contention. On page 600 of the opinion, the court there said: "Some adjudged cases are to be found going to the extent of holding, with more or less directness, that no allowance will be made from the income of the husband, while the wife has property remaining which she may subject to the payment of the expenses of the litigation and to her support. They are, however, opposed to the great weight of authority and cannot be considered

Attorney's fees. The amount of \$100.00 is being paid to the  
attorney for the purpose of the above mentioned case.  
of said children to the said...

In consideration of the above and for the purpose of the above  
mentioned case, the said...

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authority in this State. Alimony, in its technical sense, related to the income, a sum to be paid from the income of the husband, not by exhaustion of the corpus of his estate. And it is undoubtedly the rule that where there is no income, and the payment of the allowance will result in diminishing the estate from which the income is derived, it will not ordinarily be permitted to extend beyond providing for the actual wants and necessities of the wife. But if the husband has committed breaches of his marital obligation entitling her to a divorce, or she is living separate and apart from him through his fault, and without fault herself, which, if the prosecution of her suit be in good faith, must, on these applications, be assumed, she is entitled to be maintained and supported consistently with her station in life and the ability of the husband, if the money required therefor be not more than a just and equitable proportion of the joint income of herself and husband."

And the court in that case continuing, said: "It would seem equitable and just that the wife, who is prosecuting her suit in good faith, should be placed upon an equality with the husband, and if her income be insufficient to maintain her, and to carry on the litigation, his income should be required to contribute before she should be required to exhaust her estate."

The defendant also cites the case of Decker v. Decker, 279 Ill. 300. That case quotes and affirms the doctrine and law announced in the Harding v. Harding case, and also says



this: "Where they both have an income the method of computation of a proper allowance for her support and maintenance is to add the wife's annual income to her husband's, consider what, under all the circumstances, should be allowed her out of the aggregate, then from the sum so determined deduct her separate income, and the remainder will be her proper annual allowance. (Harding v. Harding, 144 Ill. 588.) It is also a rule of equity in such cases that the wife shall not be put in a worse condition by reason of her marriage, the dissolution of which has been caused by her husband's wilful misconduct. 'Equity and good conscience require that the husband shall not profit by his own wrong, and that restitution shall be made to the wife of the property which she brought to the husband, or a suitable sum in lieu thereof be allowed out of his estate, so far as may be done consistently with the preservation of the rights of each, and also that a fair division shall be made, taking into consideration the relative wants, circumstances and necessities of each, of the property accumulated by their joint efforts and savings'." And the court continuing, after citing cases, said: "The sum and substance of the various holdings is that the wife shall not merely have what necessity demands but what complete justice requires. \*\*\*"

After reading these cases, this court is of the opinion that the basis of awarding or not awarding alimony or support money does not depend so much upon the separate estates of either the husband or wife, as it does upon the incomes of

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each. Applying that rule to this case, the income of the defendant is approximately \$12,000.00 per year. That of the plaintiff, after paying on loans and meeting other expenses, is approximately \$6,000.00 per year. Out of the yearly income she has fixed obligations of at least half that amount, so that her net money per year for her own support is considerably less than that of the husband.

Our courts have laid down another yardstick to be used as to the allowance of alimony or support money for the wife. In the case of Eyerly v. Eyerly, 363 Ill. 517, the court there said: "There is no hard and fast rule for the fixing of alimony. Matters which are usually considered by the court in determining alimony are the ages of the parties, their condition of health, the property and income of the husband, separate property and income, if any, of the wife, the station in life of the parties as they have heretofore lived, and whether or not there are any children dependent upon either for support, and also the nature of the misconduct of the husband. It was never intended that the allowance of alimony shall be used as a means of visiting punitive damages upon the husband in favor of the wife for the husband's misconduct, but, guided by the different phases, heretofore mentioned, of the situation of the parties, such allowance is to be made as may furnish the wife support or contribute to her partial support. (Gilbert v. Gilbert, 305 Ill. 216)." While it is true, as urged by the





defendant, citing the cases of Buehler v. Buehler, 373 Ill. 626, and Byerly v. Byerly, 363 Ill. 517, that the allowance of alimony is to furnish the wife's support or contribute to her partial support and is not to visit punitive damages on the husband for misconduct, yet, in the case of Harding v. Harding, 180 Ill. 481, cited by the defendant, that court, holding that the amount of alimony in a separate maintenance suit is arrived at in the same manner as in divorce cases, said: "The conduct of the parties may very properly be taken into consideration upon the question of alimony \*\*\*\*. In cases where the circumstances may justify a divorce under our statute there may be widely different degrees of merit on the one side and censure on the other, which would very properly be considered in determining the question of alimony, quite independent of the pecuniary circumstances of the parties."

It would seem that the question of allowance of attorney fees in this case would follow the rules laid down by our courts for the allowance of alimony or support money. In the case of Adams v. Adams, 398 Ill. 581, an allowance for solicitor's fees had been allowed, and that court held that while solicitor's fees should not be awarded to the wife in a divorce suit where she is more able to pay them than the husband, an award of alimony and solicitor's fees to the wife is not erroneous where it is warranted by consideration of the financial circumstances of the parties, there being no contention he is unable to pay the alimony and the circumstances show her need of the allowance.

defendant, citing the case of United States v. ...  
and United States v. ..., 11 F. 2d 100, 101 (1st Cir. 1942).  
It is also noted that the defendant's conduct was  
in violation of the provisions of the Espionage Act,  
which prohibit the disclosure of information relating to  
the national defense. The defendant's actions are  
found to be in violation of the provisions of the  
Espionage Act, and the defendant is found guilty of  
the crime of espionage. The defendant is sentenced to  
the penalty provided by law for this offense.  
The court further finds that the defendant's actions  
were done with the intent to harm the United States  
and its interests. The defendant is found guilty of  
the crime of espionage, and the sentence is imposed  
as provided by law. The court reserves the right to  
modify the sentence at any time.

This court in passing upon this appeal must examine all the facts and circumstances. Here, the defendant and the plaintiff were married over thirty years. She bore him nine children, eight of whom survive and two of which are still minors and live with her. Without any mitigating circumstances being shown, he commenced to go around with another woman, much younger than himself or his wife, creating a condition that was intolerable to her and compelling her to withdraw from the home. The defendant admits there was no fault on the part of the wife. In reaching a decision this court will not only consider the finances of both parties but will consider the reasons that brought about the separation, and in short, examine all the facts and base its decision upon all those facts. The trial court heard the case and fixed the amount of alimony and allowed attorney fees. Unless the decree of the trial court was palpably erroneous, it should not be disturbed. We do not find any such error, but on the contrary the decree is amply justified by the facts.

As to the allowance by the court for the support of the children, which the defendant contests on the ground that no order awarding the custody to the plaintiff was made by the trial court, this court cannot consider this alleged error for the reason that no question was made of the matter in the trial court. A matter that is not raised in the trial court cannot be raised on appeal. In Werner v. Steele, 8 Ill. App. 2nd, 460, at page 465, that court said: "A search of

This court is hereby ordered that the parties to the  
the facts and circumstances of the case be  
officially be required to file a joint  
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the abstract reveals that this point was not raised by the pleadings nor decided by the trial court and therefore need not be considered here. *Ginther v. Duginger*, 6 Ill. 2nd 474, 480."

The plaintiff has filed in this court a motion to strike the brief of the appellant and dismiss the appeal, but since we have discussed the case in detail and decided it on the merits, there is no point in passing on this motion.

Since our courts have consistently held that the allowance of separate maintenance and attorney's fees are largely within the discretion of the chancellor and we are not disposed to disturb his findings and decree, the decree will be affirmed.

Affirmed.

The abstract reveals that this study was not intended to be  
binding nor to be used as a basis for further research.  
It is considered that the results of this study are not  
reliable.

The results of this study are not intended to be  
binding nor to be used as a basis for further research.  
It is considered that the results of this study are not  
reliable.

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PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

v.

MICHAEL BATTIESSE,  
Plaintiff in Error.

13 I.A.<sup>2d</sup> 429

ERROR TO

MUNICIPAL COURT

OF CHICAGO

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF  
THE COURT.

Plaintiff in error, hereafter called defendant, seeks the reversal of a judgment sentencing him to three years in the House of Correction on a finding of guilty on an information charging him with unlawfully having in his possession and under his control "a quantity of heroin, a derivative of opium, a narcotic drug." The trial was before the court.

Two police officers testified to entering the flat of defendant in the City of Chicago under a search warrant; that defendant ran through the kitchen to the rear door. Officer Bryson, who was the first to enter the flat, testified that he was immediately behind the defendant, who was just about to open the door; that he saw him throw something down right at the back door; that he, the officer, immediately picked it up and placed defendant under arrest. The matter which the witness said defendant threw down at the rear door was examined in the police crime laboratory, and is stipulated to be 4.42 grams of heroin. Defendant denied throwing anything out of the back door; of ever having had possession of the vial containing the heroin, or of having seen it until

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) under the conditions (2). It is shown that the system (1) has a solution if and only if the conditions (2) are satisfied. The proof of this theorem is given in the next section.

2. In the second part of the paper, the problem of the uniqueness of the solution of the system (1) is considered. It is shown that the system (1) has a unique solution if and only if the conditions (2) are satisfied. The proof of this theorem is given in the next section.

3. In the third part of the paper, the problem of the stability of the solution of the system (1) is considered. It is shown that the system (1) has a stable solution if and only if the conditions (2) are satisfied. The proof of this theorem is given in the next section.

4. In the fourth part of the paper, the problem of the asymptotic stability of the solution of the system (1) is considered. It is shown that the system (1) has an asymptotically stable solution if and only if the conditions (2) are satisfied. The proof of this theorem is given in the next section.

5. In the fifth part of the paper, the problem of the boundedness of the solution of the system (1) is considered. It is shown that the system (1) has a bounded solution if and only if the conditions (2) are satisfied. The proof of this theorem is given in the next section.

6. In the sixth part of the paper, the problem of the periodicity of the solution of the system (1) is considered. It is shown that the system (1) has a periodic solution if and only if the conditions (2) are satisfied. The proof of this theorem is given in the next section.

7. In the seventh part of the paper, the problem of the ergodicity of the solution of the system (1) is considered. It is shown that the system (1) has an ergodic solution if and only if the conditions (2) are satisfied. The proof of this theorem is given in the next section.

8. In the eighth part of the paper, the problem of the mixing of the solution of the system (1) is considered. It is shown that the system (1) has a mixing solution if and only if the conditions (2) are satisfied. The proof of this theorem is given in the next section.

9. In the ninth part of the paper, the problem of the entropy of the solution of the system (1) is considered. It is shown that the system (1) has a solution with finite entropy if and only if the conditions (2) are satisfied. The proof of this theorem is given in the next section.

10. In the tenth part of the paper, the problem of the information of the solution of the system (1) is considered. It is shown that the system (1) has a solution with finite information if and only if the conditions (2) are satisfied. The proof of this theorem is given in the next section.



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produced on the trial. Another officer testified that he heard officer Bryson ask what he had thrown out. This officer did not see the defendant throw anything. Complaint is made because of alleged inconsistency between the testimony of the two officers. The determination of the facts was a question for the trial court. The inconsistencies complained of are not vital to the determination of the defendant's guilt. Acceptance of officer Bryson's testimony that defendant ran to the rear door and threw out the vial containing the heroin, is evidence of conduct indicating knowledge by defendant of the contents of the vial, and his guilty possession of it. No question was raised on the trial as to the validity of the entry of the officers in defendant's flat. There was no motion to suppress any evidence. The testimony of officer Bryson is sufficient to sustain the finding of guilty made by the court.

The judgment is affirmed.

AFFIRMED.

BURKE and FRIEND, JJ., CONCUR.



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*[Handwritten signature]*

46952

ELIZABETH A. CURRAN,  
Plaintiff-Appellant,

v.

HARRIS TRUST AND SAVINGS BANK,  
a banking corporation,

Defendant,

HARRIS TRUST AND SAVINGS BANK,  
a banking corporation,

Counter-plaintiff,

v.

ELIZABETH A. CURRAN,

THOMAS D. NASH, JR., Adminis-  
trator de Bonis Non with  
the Will Annexed of the  
Estate of HELEN CARLIN,  
Deceased, LOUISE MCGOUGH,  
MARGARET MAHAN,

Counter-defendants.

13 I.A.<sup>2d</sup> 430

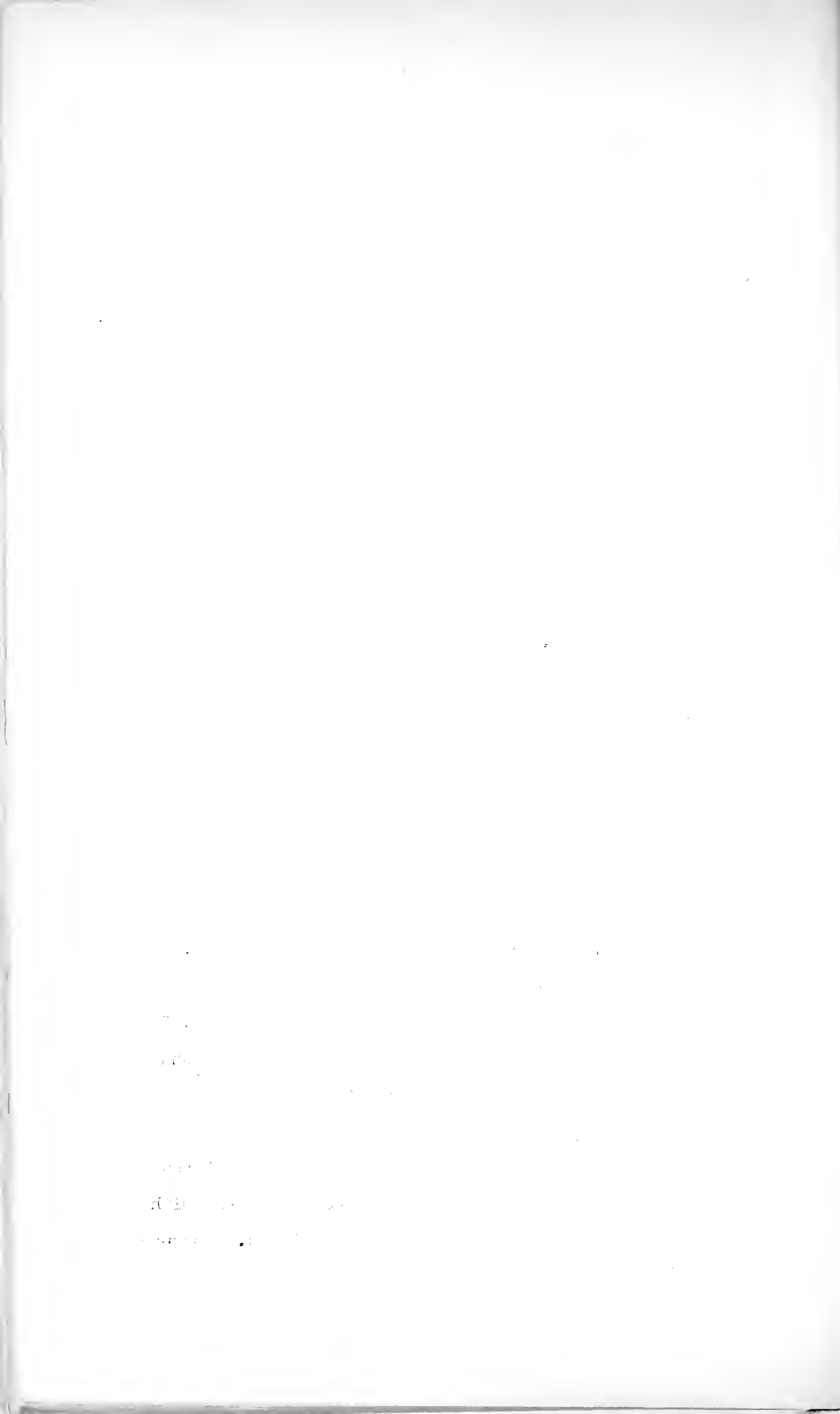
APPEAL FROM

SUPERIOR COURT,

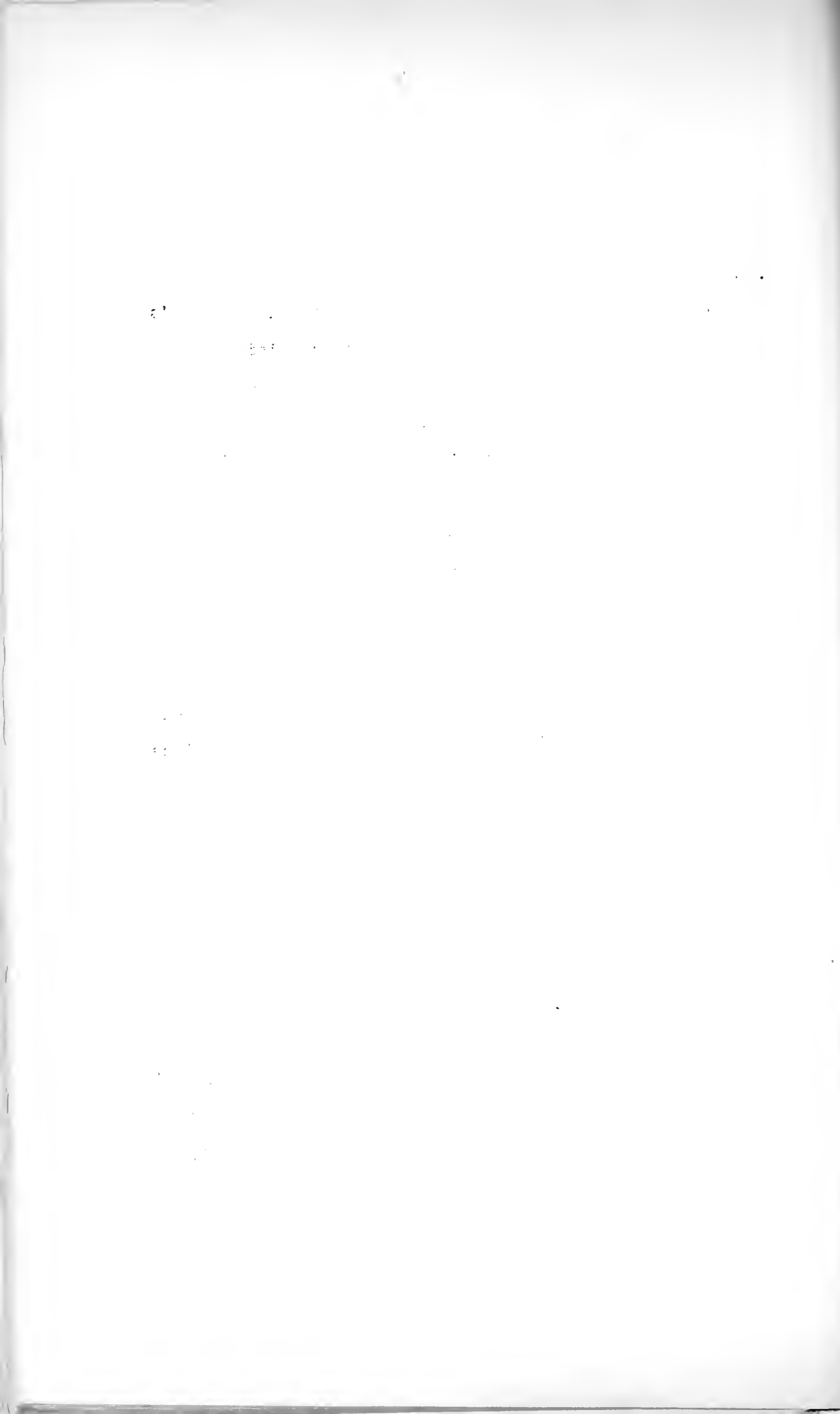
COOK COUNTY.

JUDGE FRIEND DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered in three separate actions which were consolidated for trial in the Superior Court. One is a complaint, No. 51-S-16 654, instituted by Elizabeth A. Curran against the Harris Trust and Savings Bank to recover the sum of \$21,905.65 on deposit in that bank. The bank filed its answer and also an amended and supplemental counterclaim for equitable relief, and asked further that it be allowed to pay the above sum into the registry of the court and that the counterdefendants be ordered to interplead with each other to determine their respective rights. Pursuant

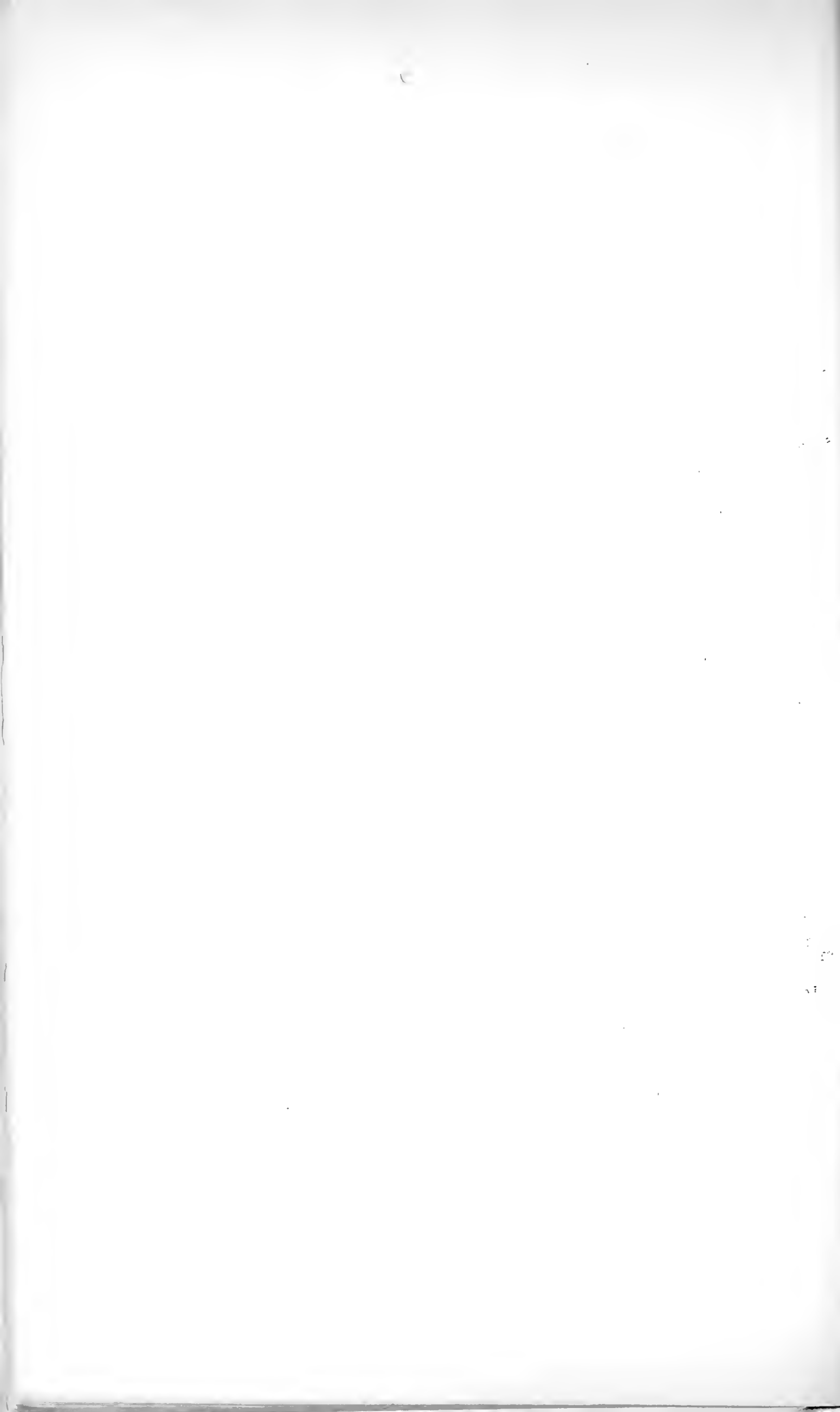


to the final decree of interpleader entered on the bank's counterclaim, it deposited \$22,387.44 (the original sum involved plus accrued interest) with the clerk of the Superior Court, and Elizabeth A. Curran and Thomas D. Nash as administrator were enjoined from any further prosecutions against the bank with respect to this sum and were ordered to interplead their respective rights thereto. The second action in this appeal is a suit in chancery to construe a contract dated July 20, 1951 filed in the Superior Court as No. 52-S-8 869 by Elizabeth A. Curran as plaintiff against Nash as administrator and other defendants. The third action is a petition for citation originally filed in the Probate Court of Cook County, pursuant to sections 183 and 185 of the Probate Act (Ill. Rev. Stat. 1951, ch. 3) by Nash as administrator to recover from the respondent Elizabeth Curran certain monies, United States bonds and a check payable to the order of Helen Carlin, the deceased; it was subsequently heard in the Superior Court de novo as case No. 53-S-12 570, on appeal from the Probate Court. Pursuant to hearing, the Superior Court found the issues in all three cases in favor of Nash as administrator and against Elizabeth Curran. The order made a final disposition of the claims in the interpleader case by finding that the sum of \$22,387.44, deposited with the clerk of the Superior Court pursuant to the decree of interpleader, was the property of the administrator, and directed the clerk to pay this sum over to him. The decree disposed of the



complaint in chancery to construe the contract by dismissing the complaint for want of equity, and it disposed of the administrator's petition for citation by finding that the monies in Elizabeth Curran's possession, the bonds to which these funds had been converted, and the check in her possession payable to the order of Helen Carlin, were assets of Helen Carlin's estate, and directed Elizabeth Curran to surrender these properties to the administrator. Elizabeth Curran appeals from the order entered in the three consolidated causes. Several prior appeals affecting various phases of this litigation have heretofore been heard and decided in this court.

In the last appeal, reported in 5 Ill. App.2d 241, the essential facts constituting the background of the litigation were fully stated and need not here be repeated in detail. In that proceeding, Nash as administrator had filed a petition for citation in the Probate Court to recover from the respondent Elizabeth Curran certain monies, United States bonds and a check payable to the order of the deceased. On motion of the petitioner, a summary judgment was entered in the Probate Court directing respondent to turn over the property to the administrator. An appeal was then taken by Elizabeth Curran to the Superior Court, which ruled in her favor, and the administrator appealed. The appeal was taken from an order of the Superior Court which denied the administrator's motion for summary judgment, allowed the respondent's motion for summary judgment, and dismissed the petition





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for citation. Both the petitioner and the respondent in the affidavits supporting their respective motions for summary judgment had set out the execution of the agreements of March 5, 1951, April 20, 1951, and July 20, 1951. These are the same agreements admitted in evidence in the trial of the instant case. Both parties on the prior appeal asserted that the transfer of the bank deposits was made pursuant to the provisions of the agreement, and both conceded that the check received by Elizabeth Curran, payable to the order of the deceased in the sum of \$1934.28, had been neither endorsed by the deceased nor delivered by her to Elizabeth Curran. On the prior appeal Elizabeth Curran based her right to retain the funds which had been transferred to her on March 5, 1951 on the three agreements and contended that the check in her possession, payable to Helen Carlin, was her property because it represented the proceeds of the sale of some stocks which the deceased had given her on July 18, 1951. In our prior opinion (5 Ill. App.2d 241), we discussed the effect of the transfers of the bank accounts on March 5, 1951, pursuant to agreement of that date; we also considered the agreements of April 20, 1951 and July 20, 1951 and, in reversing the trial court and remanding the case for trial on the merits, stated that "we think that the true import of the transfer of these bank accounts was to vest custody in Elizabeth Curran as agent for Helen Carlin for purposes of convenience during the lifetime of Helen Carlin, and since the transfers were ineffective to vest



ownership in Elizabeth Curran after Helen Carlin's death, the accounts become the property of her administrator or legal representative of her estate; and of course when \$25,000.00 of these funds were withdrawn and invested in United States government bonds, these bonds likewise became an asset of the deceased's estate."

We also disposed of Elizabeth Curran's contention that she was entitled to retain possession of the check in her possession, payable to Helen Carlin in the sum of \$1934.28, as follows: "Moreover, it appears that respondent and the chancellor misconstrued the purpose for which these proceedings were instituted; the question was not whether decedent made a valid gift of the bonds inter vivos, as respondent and the chancellor chose to treat it, but whether the deceased by endorsement and delivery of the certificates made a valid gift of the check itself. It has been held that a negotiable instrument may be the subject of a gift inter vivos without an endorsement thereon, but the cases uniformly hold that there must be a delivery to the donee by the payee with intent to transfer title. . . . Helen Carlin died the same day the check was issued but before Elizabeth Curran could obtain from her her endorsement or delivery of the check; and so even though the above quoted statement attributed to the deceased shows an intent to make a gift of the proceeds of the sale of the bonds, nevertheless the gift was not completed during the lifetime of the deceased by delivery of the check,



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and therefore the gift failed."

The evidence offered on behalf of Elizabeth Curran at the trial of the case at bar was substantially the same as the facts presented in the affidavits supporting her motion for summary judgment which we considered in the prior appeal; substantially the same arguments were offered and the same authorities cited as are offered and cited in the brief on this appeal. To all intents and purposes Elizabeth Curran concedes that the opinion in the prior appeal conclusively answers the objections raised by her arguments in this proceeding, but she attempts to draw a parallel between the case of Farkas v. Williams, 5 Ill.2d 417, which was decided by the Illinois Supreme Court after our prior opinion was filed. We think the Farkas case can be distinguished from this proceeding in that the documents there claimed to be testamentary dispositions of the decedent's property were formal express declarations of trust, whereas in the instant case the agreements executed by decedent and Elizabeth Curran were, as we pointed out in our opinion, intended to do nothing more than to vest custody in Elizabeth Curran as the deceased's agent for purposes of convenience during the lifetime of the deceased. Moreover, since on the prior appeal we interpreted these agreements as being ineffective to vest the ownership of the funds transferred on March 5, 1951 and July 23, 1951 to Elizabeth Curran, the questions of law there decided will not again be considered. They are binding on the trial court and also on the Appellate Court in any subsequent appeal. Meyer v. Meyer, 333 Ill. App. 450;



Tree v. St. Luke's Hospital, 347 Ill. App. 368; and In re Estate of Maher, 204 Ill. 25, wherein the court said that "the rule is, that upon the remandment of a cause generally, the rules of law applicable to the case announced in the opinion of this court are conclusive upon the second hearing."

In the circumstances, we have reached the conclusion, after careful study of the record and the applicable authorities, including our former opinion, that all matters involved in the petition for citation originally filed in the Probate Court and heard in the Superior Court on appeal were disposed of by our ~~former~~ opinion on the prior appeal of the parties, and that the question of Elizabeth Curran's alleged rights as to those was conclusively disposed of in our opinion. The same would be true with respect to the suit in chancery to construe the contract of July 20, 1951 which is the subject matter of one of the cases consolidated for hearing. That contract was discussed and interpreted in our former opinion, and the question of Elizabeth Curran's alleged rights was disposed of therein.

There remains for consideration only the interpleading action ordered in response to the prayer of the Harris Trust and Savings Bank. While the deposit of \$22,387.44 made by the bank with the clerk of the Superior Court, pursuant to the decree of interpleader, was not directly in issue in the prior appeal (5 Ill. App. 2d. 241), we think that the ruling there as effectively disposes of Elizabeth Curran's claim to the ownership of that fund as though it had been. The sum of \$21,905.65 had been deposited by Elizabeth Curran

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10. The tenth part of the report



in the Harris Trust and Savings Bank on July 23, 1951, the day Helen Carlin died; it represented the total made up of a check for \$37.50 payable to Helen Carlin and endorsed by Helen Carlin and Elizabeth Curran, and withdrawals of \$11,611.73 and \$10,256.42 made by Elizabeth Curran from the decedent's accounts in the Northern Trust and Savings Bank and the Harris Trust and Savings Bank, respectively. In her answer in the interpleader case, Elizabeth Curran averred that her right to the funds was evidenced by the agreement dated July 20, 1951, and that the transfers of the bank accounts on July 23, 1951 were made pursuant to that agreement. Of course that agreement is the same one which we interpreted in the prior appeal as being ineffective to vest the ownership of the funds transferred on March 5, 1951 to Elizabeth Curran; and it would therefore follow that it was likewise ineffective to transfer the ownership of the funds transferred July 23, 1951. Accordingly, we think that this question too was decided on our former appeal.

Of course what we have said in this opinion does not affect Elizabeth Curran's right to be reimbursed for room and board and nursing services rendered to the deceased prior to her death, but the Superior Court has no original jurisdiction to allow a claim against a decedent's estate. Such claim will have to be filed and determined in the Probate Court. (Ill. Rev. Stat. 1955, ch. 3, sec. 344.)

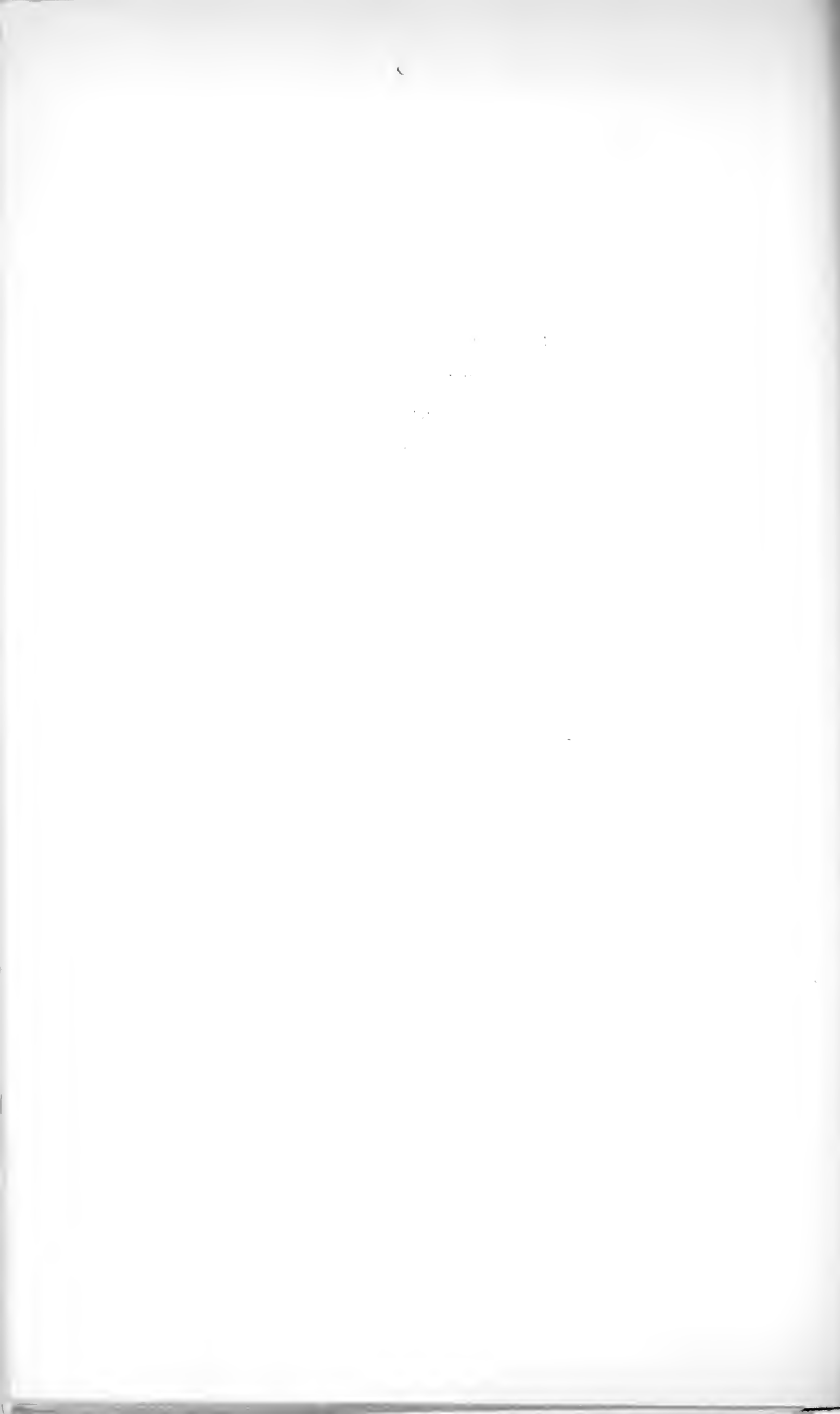


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Only one trial was held involving the disposition of the three separate suits which were consolidated for hearing. We are of opinion that the evidence and the law applied thereto justified the trial court in finding the issues in all three cases in favor of the administrator. The order of the Superior Court is therefore affirmed.

ORDER AFFIRMED.

NIEMEYER, P. J. and BURKE, J., CONCUR.



827 A

47105

CHARLES CARAVELLA,  
Appellant,

v.

MARIO QUARRELLA,  
Appellee.

13 I.A.<sup>2d</sup> 431

APPEAL FROM

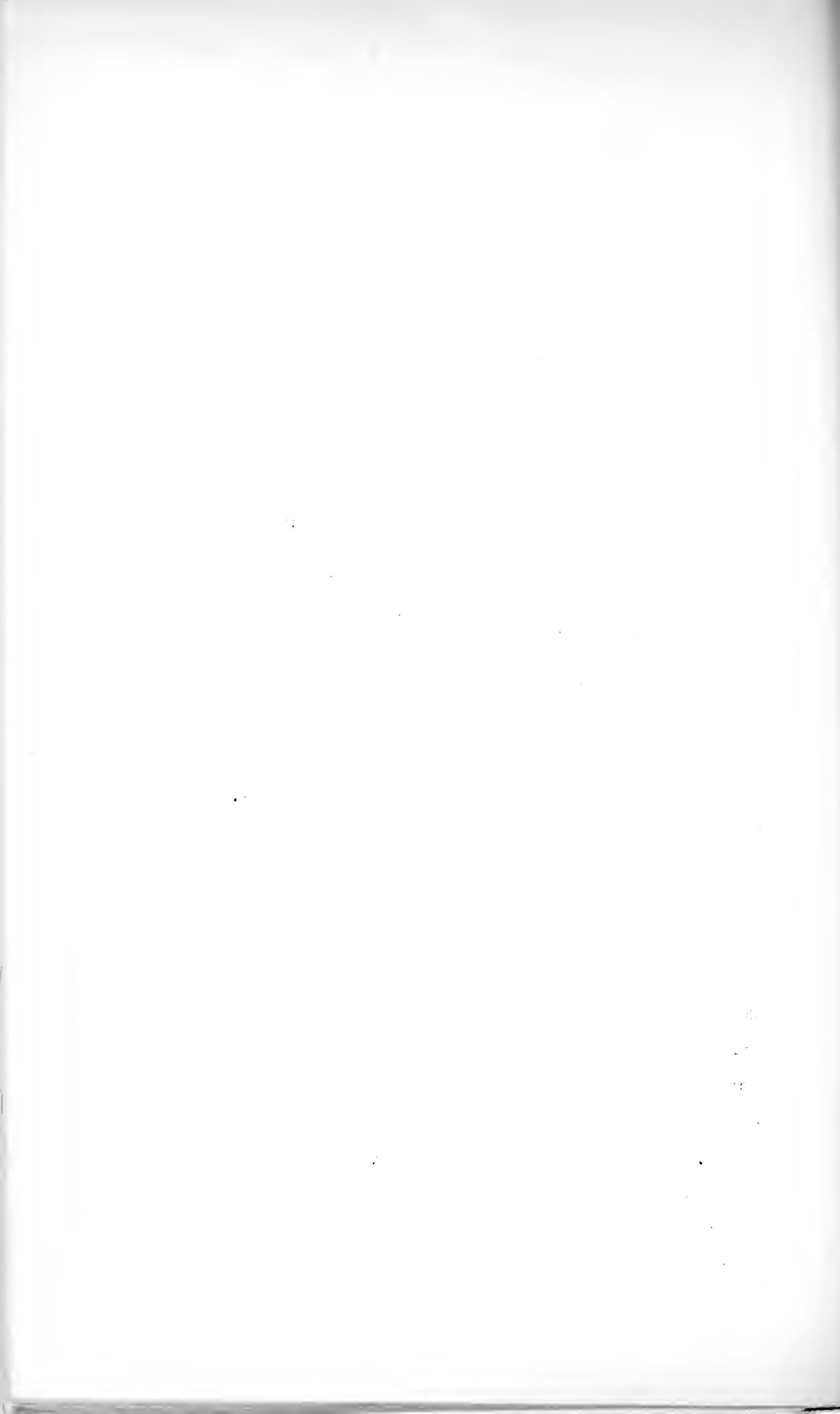
MUNICIPAL COURT

OF CHICAGO

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

Charles Caravella sued Mario Quarrella for damages for personal injuries sustained by plaintiff, a pedestrian, as the result of the alleged negligence of the defendant in backing up his automobile and striking the plaintiff. The jury returned a verdict of not guilty on which judgment was entered and plaintiff appeals.

The plaintiff testified that on March 4, 1955, at about 7:00 p.m. he alighted from a northbound Harlem Avenue bus at the southeast corner of the intersection of Harlem and Cornelia Avenues, Chicago. He had come from work and was carrying a shopping bag containing groceries. There were no sidewalks on either side of Cornelia Avenue going east from Harlem Avenue up to the alley between Harlem and Neva Avenues, which is the next block east. Beyond the alley there was a sidewalk on the north side of Cornelia Avenue only. There were curbstones on both sides. After the plaintiff alighted from the bus at the southeast corner of Harlem and Cornelia Avenues he crossed the street at that point over to the north side of Cornelia Avenue. Cornelia Avenue is approximately 40 feet wide



-2-

and when the plaintiff was about 10 feet from the north curb he turned and started to walk east because there were two cars parked along the north curb of Cornelia Avenue at that time, the first being about 2 or 3 car lengths from Harlem Avenue.

He was looking east in the direction of the oncoming cars but did not see any traffic. He reached the second parked car which was a few feet behind the first one. He did not observe any people in it nor any lights being on. Then he started to cut in to the rear of the second car, walking on a slant closer to the curb. He was hit from the rear and knocked down. He did not see the car approach him and he didn't hear anything to indicate that the car was in motion. He did not see any lights and he did not hear a horn. He was struck half-way between Harlem Avenue and the alley and about 6 or 7 feet from the north curb of Cornelia Avenue. There was a street light about 40 or 50 feet from the scene of the accident, but it was not bright and did not cast any light at the point where the accident occurred. After the plaintiff was hit he noticed that he was hit by the left side of the rear bumper of the car. The ground was wet. At that time he felt stunned and did not know what happened. After he was hit, the car stopped and the two passengers came out and asked him what was the matter, and picked him up and helped him. When the driver of the first car first got out to help him, he asked, "How are you?" and he answered, "I am all right." The

1891-1892

1893-1894

1895-1896

1897-1898



-3-

driver then asked, "Where do you live?" That was all the conversation that the plaintiff recalls. They took him home. He was in pain and had bruises from his hip to his knee. His son took him to Dr. Nuzzerella, whose father was the passenger who recommended him.

According to the defendant driver, he picked up his passenger about a quarter to seven in the evening and then turned west on Cornelia Avenue. They stopped about 6 to 8 feet from Harlem Avenue to take their coats off. The left side of the car was not more than one foot from the center line. There were no cars parked along the curb. He didn't see any people or traffic and backed up the car. He looked to the right, the left and he "guesses" that he also looked to the front and to the back. He then backed up to the parking space on the north side of the street along the curb on Cornelia Avenue. He was looking in the beam of his headlights. He backed up about 6 or 7 feet and when he was about 5 feet from the curb he looked in his side view mirror and saw a man was near his left rear bumper. That was the first time he looked in the mirror. He stopped right away but did not feel a bump. He did not blow his horn at that time. He and his passenger got out of the car and they asked, "Something is wrong, you are hurt," and the plaintiff answered, "Oh, my leg, my leg."

The car was on a slant, the rear bumper being about 5 or 6 feet from the curb and the front bumper maybe 2 feet more. The plaintiff was lying on the ground near the left bumper. Defendant estimated that the plaintiff was

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about 10 or 12 feet from Harlem Avenue, although he admitted he was not familiar with distances. He further stated that the distance between where the plaintiff was lying and Harlem Avenue was maybe one car and maybe another car length from where he was lying to the alley. He admits the plaintiff was halfway between Harlem Avenue and the alley. According to the passenger, as they approached Harlem Avenue defendant's vehicle was traveling more on the outside than on the middle of the street near the center line of Cornelia Avenue. He suggested to the driver that they stop and get out of the car to take off their overcoats. After the driver stopped, the passenger said, "Over here, its a little dangerous to get out of the car. You'd better back up a little bit and go nearer to the curb to leave the pass in case some other car passes." They decided to back up a little and go nearer the curb and take off their coats. After the driver backed up a little, he stopped the car and the passenger asked what happened. The driver replied, "There's a man over there." He further stated that the driver had his lights on and that he didn't see any pedestrians walking towards them, nor did he think there were any cars parked near the corner of Harlem and Cornelia Avenues. He repeated that the first stop the driver made was in the middle of the block between Neva and Harlem Avenues and that he started to back up but stopped right away saying, "Somebody was at the back." He stated further that the conversation with the plaintiff consisted solely

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of his own remark, "See what happened on cross the middle of the street? If you cross on Harlem Avenue this thing no happen, because on Harlem Avenue-" to which the plaintiff did not reply, but the passenger "tried to convince him" and repeated his remark.

The jury was given oral instructions. Plaintiff asserts that the court erred in giving an instruction in the language of the statute relative to a pedestrian crossing the roadway at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection. The instructions given by the court were comprehensive and when considered as a connected series fairly instructed the jury on the issues. The case presented factual issues. We are convinced that the jury could not be and was not misled by the instruction.

Plaintiff urges that the court erred in refusing to give an instruction embodying provisions of an ordinance and a statute to the effect that the driver of a vehicle shall not back the same unless the movement can be made with reasonable safety and without interfering with other traffic. In our opinion the instructions given by the court adequately covered all of the issues, and the court did not err in refusing to give the requested instruction.

Finally, plaintiff insists that the court erred in allowing an irrelevant remark of a nonobserving non-participant which was calculated to mislead the jury into believing that the plaintiff admitted he crossed in the

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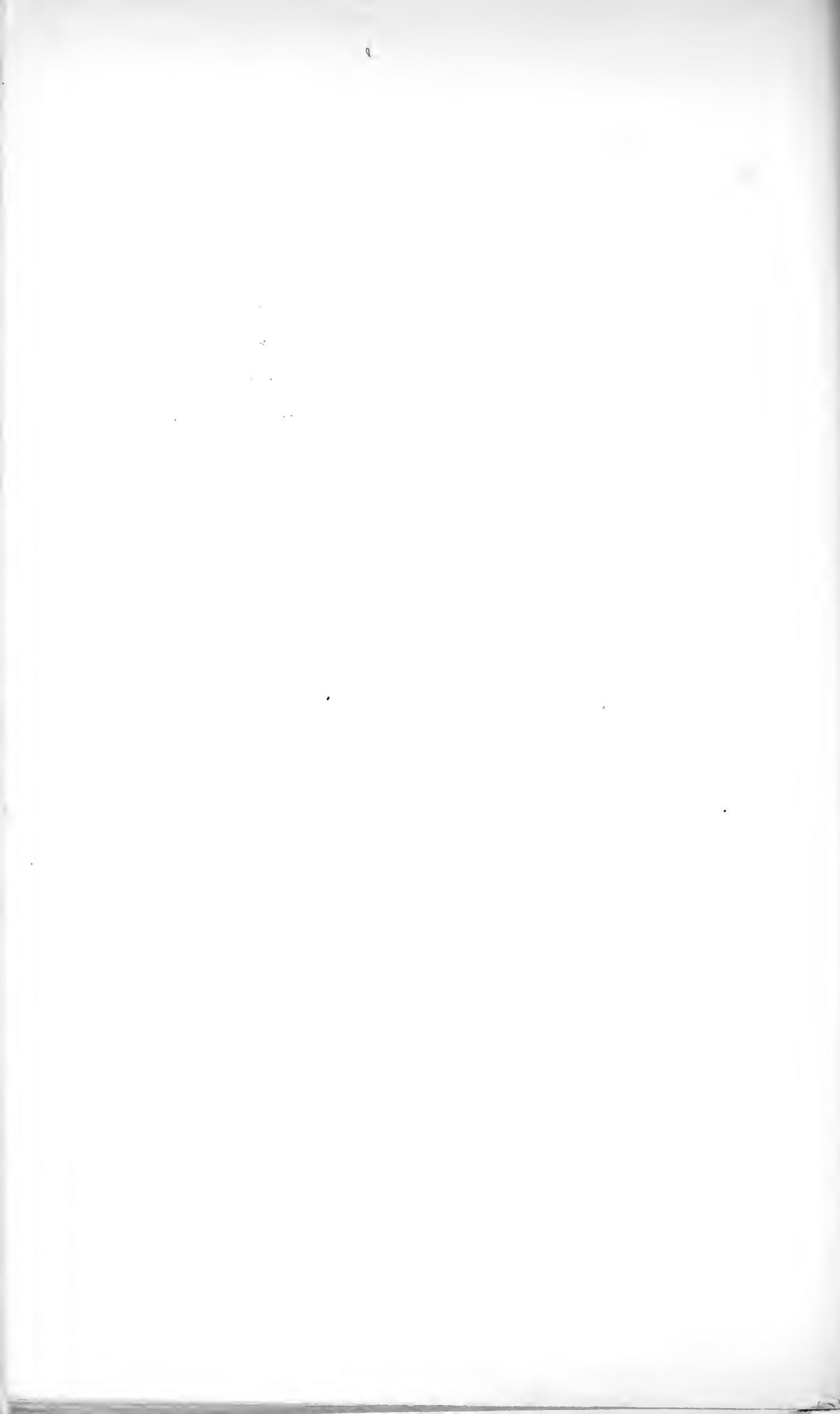
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middle of the street. The transcript of the testimony discloses that plaintiff made no objection to the question propounded by the defendant. The objection that plaintiff presents at this time was not voiced in the trial court and he is not in a position to raise a question that he failed to urge during the trial.

For the reasons stated the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

NIEMEYER, P. J., and FRIEND, J., CONCUR.





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47104

NANCY LEVINSON,  
Plaintiff-Appellee,

v.

KING'S COURT CORPORATION, a  
corporation, F. A. GATES and  
JOCELYN GATES, his wife, ALMA  
BABA,  
Defendants-Appellants.

13 I.A.<sup>2d</sup> 432

APPEAL FROM

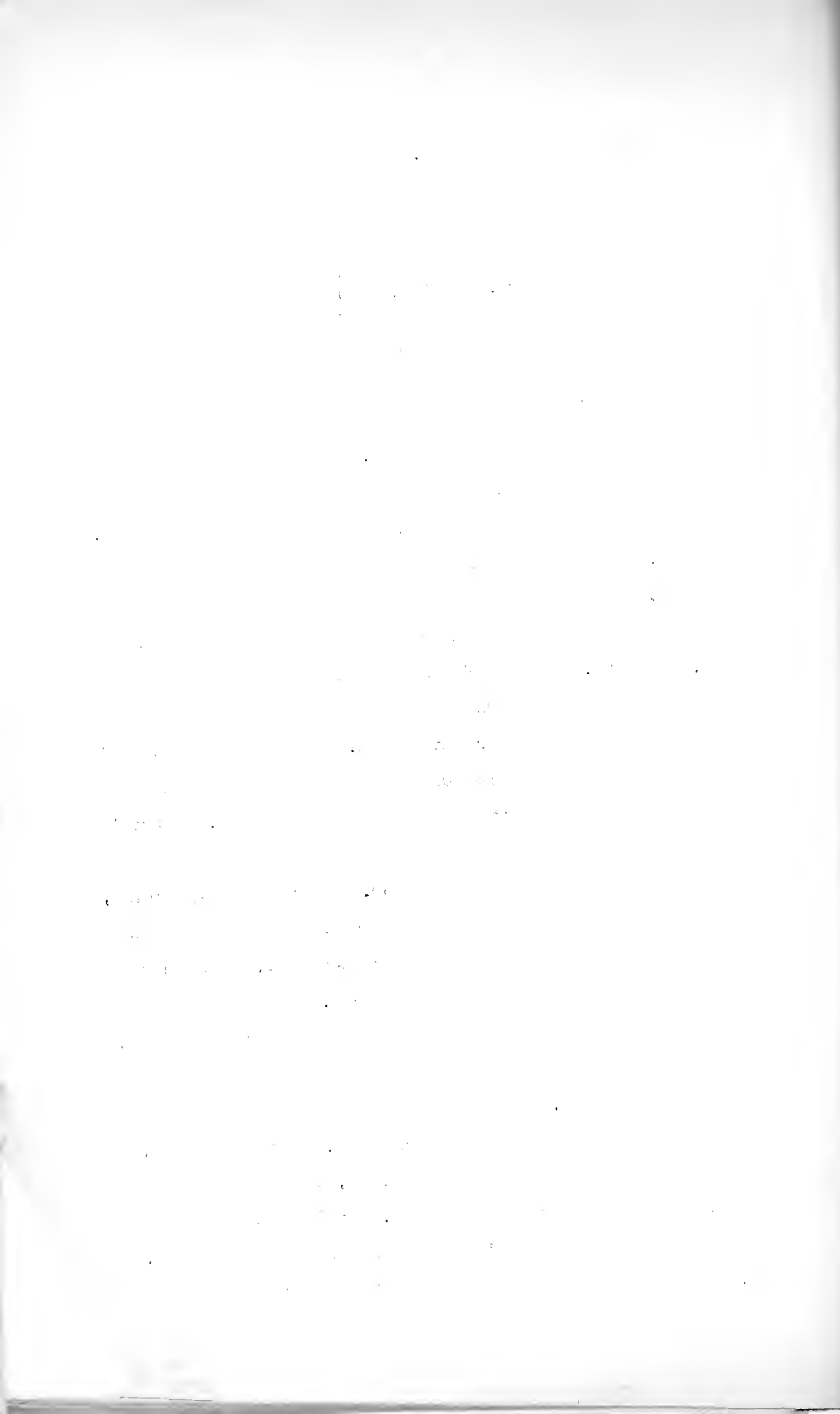
COUNTY COURT,

COOK COUNTY.

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

Nancy Levinson sued F. A. Gates and Jocelyn Gates, his wife, Alma Baba and King's Court Corporation to recover \$900 claimed to have been earned as a broker's fee in the sale of a house owned by the Gates' to Amejan Baba and Alma Baba, his wife. Plaintiff also claimed damages against Mr. and Mrs. Gates, Mrs. Baba and the corporation for conspiracy to defraud her out of her commission. After the defendants' motions to dismiss the complaint were denied, their answers joined issue on the matters hereinafter discussed. A trial without a jury resulted in a judgment for the plaintiff against all the defendants for \$450. Defendants, appealing, ask that the judgment be reversed and that judgment be entered in their favor. Plaintiff, in a cross-appeal, prays that judgment be given in her favor for \$900.

Plaintiff was the only witness in her own behalf. She has been a licensed real estate broker since 1932 with an office in Winnetka. The corporation is engaged in the real estate business in Wilmette. Kenneth H. King of Glencoe, a licensed real estate broker since 1936, is secretary and treasurer of the corporation. Mrs. Estelle Wehrheim of Wilmette is a real estate saleswoman for the corporation. F. A. Gates and Jocelyn Gates were the owners as joint tenants



of the house which they occupied as a residence at 104 16th Street, Wilmette. The house has two bedrooms, a living room, dining room, kitchen, bathroom, porch and basement.

Previous to the showing of the Gates' house to Mrs. Baba, the Gates' had advertised their home for sale in the newspapers at a price first of \$19,500 and then at a price of \$18,900. Plaintiff testified that on August 12, 1954, having seen the advertisement, she spoke to Mrs. Gates on the telephone and secured a listing of the property for the sale price of \$19,500. She said she talked to Mrs. Gates again on Monday, September 13, 1954, and was then informed by Mrs. Gates that the price was reduced to \$18,900, of which \$900 was for the broker and that "they wanted eighteen net." She said that Mrs. Gates told her that the price was reduced because "they were very anxious to sell their house" and that "they had another house that they wanted to buy." The week preceding Monday, September 13, 1954, Mrs. Baba observed in the local newspaper plaintiff's advertisement of houses for rent and for sale. In a telephone conversation between plaintiff and Mrs. Baba the former stated that she had houses for rent and for sale. Plaintiff made an appointment to call on Mrs. Baba and show her some houses.

On Monday, September 13, 1954, plaintiff informed Mrs. Gates that she would bring her "client" to the premises the following afternoon. Plaintiff called at Mrs. Baba's dress shop on Tuesday afternoon, September 14. Mrs. Wehrheim, a stranger to plaintiff, was in the dress shop. Mrs. Wehrheim had with her a book containing pictures and descriptions of houses. Mrs. Baba intended to look through the book. Mrs. Wehrheim, a representative of the corporation, was a friend of Mrs. Baba and had been endeavoring to sell her a house for

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about two months. The Gates' house was also listed for sale by the corporation. On Tuesday afternoon plaintiff drove her car to the dress shop. Mrs. Baba got into the car accompanied by Mrs. Wehrheim. While plaintiff was driving her car to visit houses to be inspected by Mrs. Baba she, plaintiff, learned that Mrs. Wehrheim was a saleswoman for the corporation. Plaintiff drove first to a house at 222 9th Street, Wilmette, which is now owned by the Gates'. This house was not satisfactory to Mrs. Baba because it was too large. Plaintiff then drove to the Gates' house. Mrs. Wehrheim remained in the car while plaintiff and Mrs. Baba went into the house and Mrs. Baba inspected it. Plaintiff testified that Mrs. Baba said to Mrs. Gates: "This is the finest house I have ever seen. I have looked at many houses. I would love to have my daughter see it." She stated further that Mrs. Gates told Mrs. Baba to "bring her daughter back." Plaintiff testified further that on Tuesday afternoon she told Mrs. Baba the price was \$18,900 and that after Mrs. Baba saw the house she said she could pay \$3,000 down and \$250 monthly; that she called Mrs. Gates on the telephone and told her of the proposal of Mrs. Baba as to terms; that Mrs. Gates said: "I think we might be able to do that, I will have to ask my husband;" that her husband had been talking about a mortgage on the house so that it would make it easier for someone to buy it; and that plaintiff then called Mrs. Baba on the telephone and told her that "it looked pretty good to me." Plaintiff testified that Mrs. Gates called her on the telephone and said her husband was not in but that he would call her and that she thought she would hear from him in a short time; that later Tuesday afternoon plaintiff called

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Mrs. Gates to inquire as to any communication with Mr. Gates; that Mrs. Gates said she heard from her husband and that he said: "We can work it out" and that "we can raise our mortgage with Mrs. Baba's cash payment of \$3,000 and the \$250 a month Mrs. Baba also would pay would be sufficient to make the payments on the mortgage and also pay ours." Plaintiff stated further that she then called Mrs. Baba and told her the story and that Mrs. Baba was quite happy. She told Mrs. Baba that the Gates were willing to sell on her terms of \$3,000 down and \$250 a month at the price of \$18,900. She asked Mrs. Baba for a check and the latter said: "Give me another day because King's Court has my money, its on deposit on another house that they have been showing me, and I can't get it right away." On Wednesday morning, September 15, plaintiff called at the dress shop of Mrs. Baba for the purpose of picking up a check as a down payment. Mrs. Baba was not in. Plaintiff went to Park Forest to see her grandchildren that afternoon and did not return home until about 11:00 P.M. On Thursday, September 16, plaintiff called Mrs. Baba on the telephone. Plaintiff stated that Mrs. Baba wanted "to be friends with everybody"; that the corporation had spent three weeks showing her houses and the corporation "has been so nice to her that she felt that in some way they should participate." Plaintiff answered that she had nothing to do with the corporation and that "they did not show you the house." Thereupon plaintiff called Mrs. Gates on the telephone. She did not wish to talk to plaintiff and plaintiff talked to Mr. Gates. He said she would have to talk to the corporation. On calling the corporation office Mr. King said he was "getting out an exclusive." She quoted

THE UNIVERSITY OF CHICAGO

THE DIVISION OF THE PHYSICAL SCIENCES

DEPARTMENT OF CHEMISTRY

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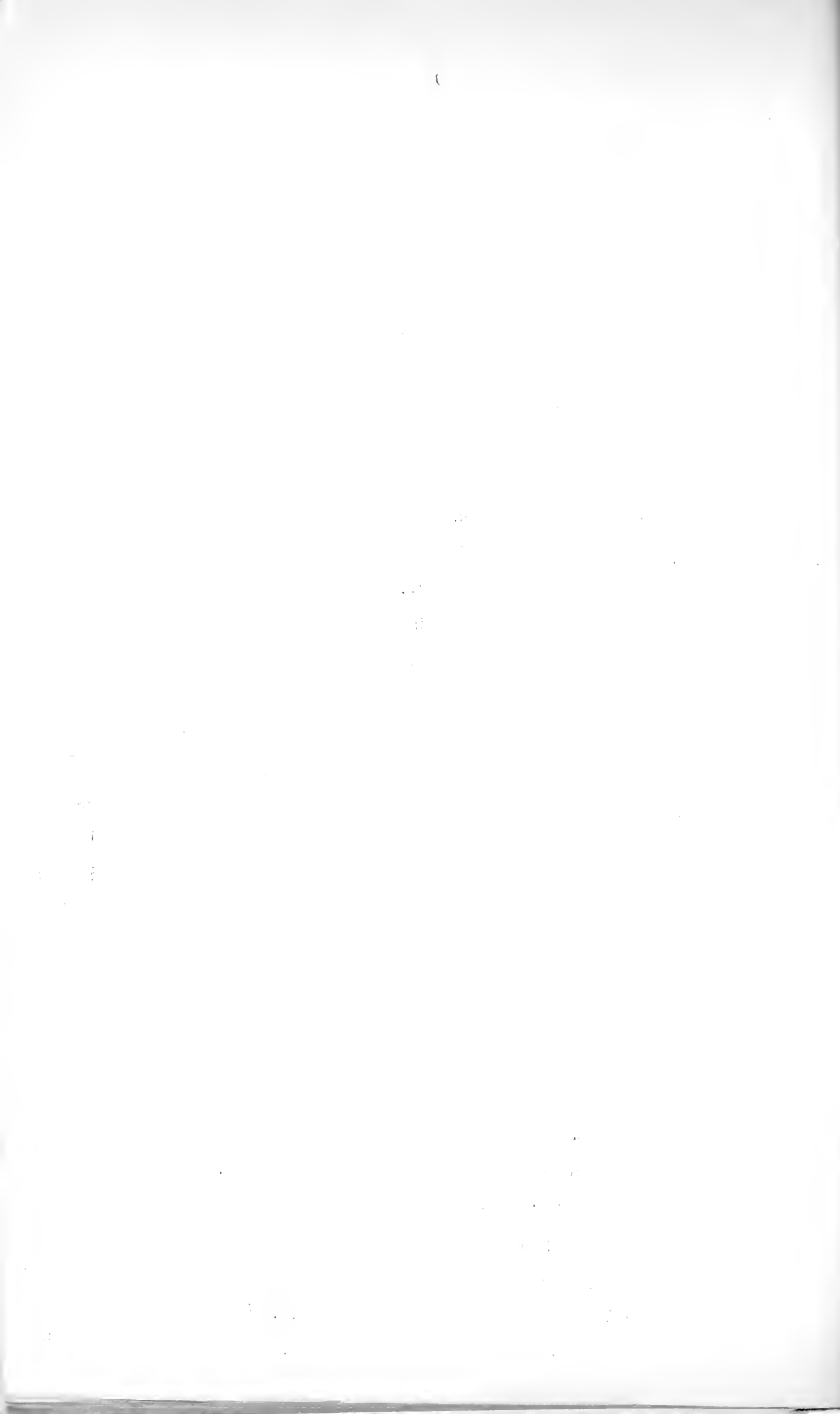
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him as saying that he also had a contract and that she "spent one hour in the house" and he would give her \$50 for her time.

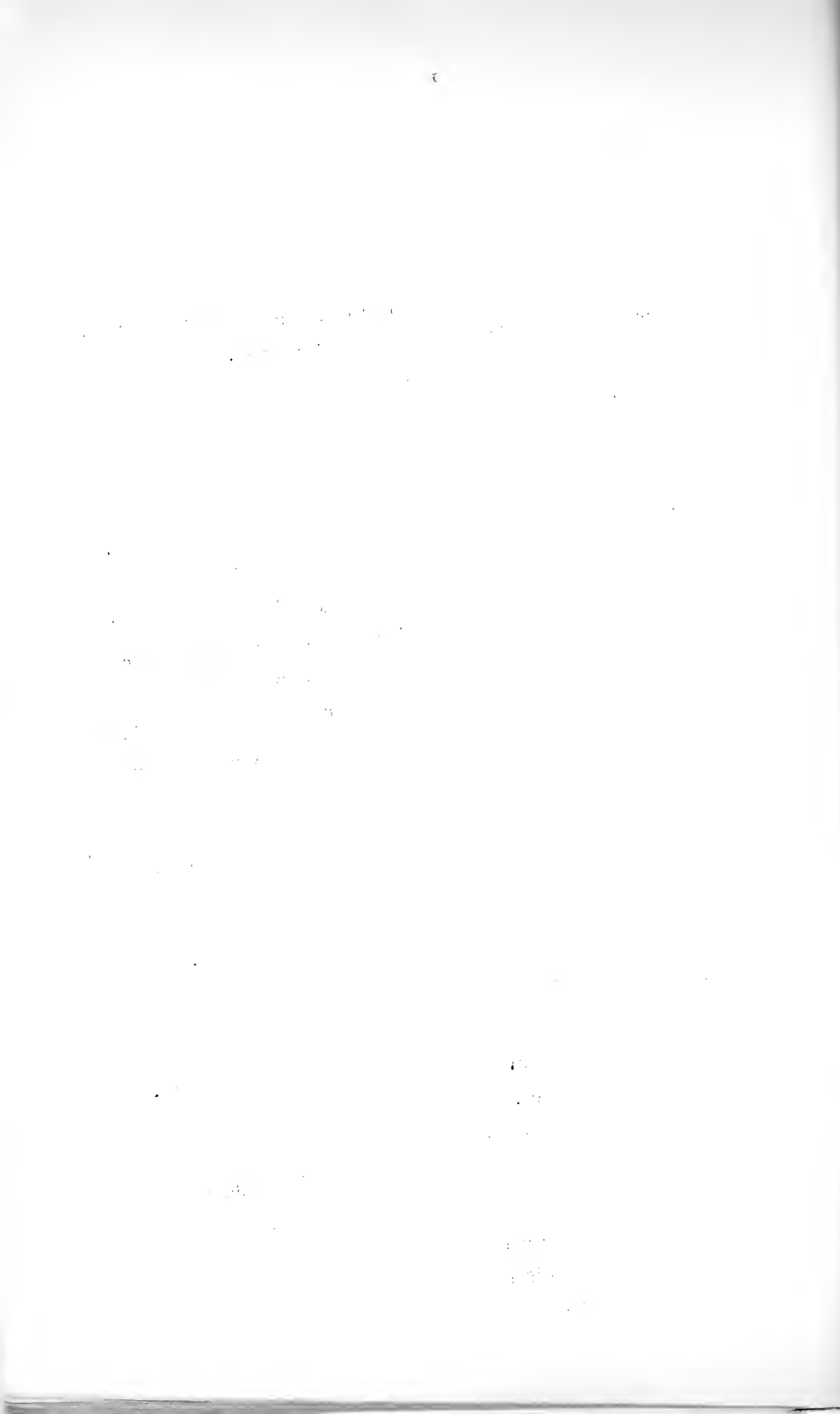
Without the knowledge of plaintiff, Mrs. Baba, accompanied by her daughter, went to the Gates' house on Tuesday evening, September 14, to examine the house. That was the evening of the afternoon when plaintiff showed the house to Mrs. Baba. Present on Tuesday evening in the Gates' house were Mr. and Mrs. Gates, Mr. King, Mrs. Wehrheim and Mrs. Baba. That evening Mr. and Mrs. Gates signed and delivered an exclusive sales agreement granting the corporation the sole authority to sell the property at a price of \$18,900 for a period of three months. At the insistence of Mr. Gates there was written on the reverse side of this exclusive agreement an agreement signed by the corporation to indemnify the Gates in the event of litigation pertaining to the commission in the sale of the premises and to pay any judgment rendered by reason of such litigation. On September 16, 1954 the Gates entered into a contract for the sale of their property to Mrs. Baba for \$18,900 with a down payment of \$3,000 and payments of \$200 per month. The name of plaintiff was inserted in this contract as the broker together with the corporation. Her name was stricken with pen and ink by Mr. King at the request of Mr. Gates without the knowledge of plaintiff. On November 9, 1954, Articles of Agreement for a warranty deed were executed as contemplated by the agreement of September 16. Mrs. Baba testified that while in the automobile on Tuesday afternoon she told plaintiff that she had a deposit with the corporation and would buy a house through it whenever she bought. This witness further testified that she never told plaintiff that



-6-

she would buy the Gates' house through her and that she told plaintiff the corporation must handle the deal. Mrs. Gates testified that she told plaintiff that she could make no arrangements whatever with her and that her husband only could make the arrangements. Mr. and Mrs. Gates testified that they did not employ plaintiff as a broker to sell their house. Plaintiff never advertised the Gates house for sale.

Defendants state that before plaintiff can be entitled to a broker's commission for the sale of the Gates' real estate, she must prove that the Gates employed her for that purpose. Plaintiff answers that a contract to pay commissions to a broker may be implied from the acts and words of the seller. Plaintiff had the burden of proving that the Gates employed her as a broker. This employment need not be established by an express contract. It may be implied from the conduct and words of the parties. The evidence establishes that the Gates listed the house for sale with plaintiff. It was also listed with other brokers, including the corporation. The property was first listed at a price of \$19,500. When no buyers were found who would pay that amount the price was reduced to \$18,900 with the understanding that the \$900 would be the broker's commission. At the time plaintiff took Mrs. Baba to the house both Mrs. Baba and Mrs. Gates knew that plaintiff was a real estate broker and that she was showing the house for the purpose of making a sale. The conduct of all the parties, as well as their words, established an implied contract between Mr. and Mrs. Gates and plaintiff to pay a commission should plaintiff procure a purchaser on the terms proposed by the sellers.



The defendants assert that a real estate broker is not entitled to a commission for the sale of real estate unless he first produces a purchaser ready, willing and able to purchase the same and who enters into a legal, written contract binding upon both the owner and the purchaser, citing Wilson v. Mason, 158 Ill. 304; Chapman v. Illinois Midwest Stock Land Bank, 302 Ill. App. 282, and other cases. In the Wilson case, the court said (309):

"The duty of a broker, who is employed to sell real estate, is to find and produce to the vendor a purchaser, who is ready, willing and able to complete the purchase as proposed. This he must do before he is entitled to any commissions. If the vendor rejects the purchaser so produced, the broker is bound to show that such purchaser was willing, ready and able to perform the contract according to the proposed terms. If the principal accepts the purchaser thus presented, either upon the terms previously proposed or upon modified terms then agreed upon, and a valid contract is entered into between them, the commission is earned. In such case, the broker has earned his commission although the sale is never actually completed, if the failure of the purchaser to complete the sale results from the inability of the vendor to make a good title, and without fault on the part of the broker. \* \* \* An agreement by a real estate broker to procure a purchaser not only implies that the purchaser shall be one able to comply, but that the seller and the purchaser must be bound to each other in a valid contract."

In the case at bar the Gates and the Babas entered into an agreement binding upon both of them. The only change in the terms of the deal procured by plaintiff and the consummated deal was that the monthly payments were \$200 instead of \$250. There was no substantial change in the terms. It will be observed that the exclusive sales agreement calls for a sale price of \$18,900 or any lesser amount that the sellers agreed to accept.

Defendant say that a verbal contract for the purchase of real estate is not binding upon either the vendor or the vendee and that it necessarily follows that plaintiff



would not be entitled to a commission for the sale of the Gates' property based upon a mere verbal expression of satisfaction as to the purchase price. The defendants did not give plaintiff an opportunity to procure a written contract. Nevertheless a written contract was entered into. They are not in a position to take advantage of their misconduct. Defendants also state that a broker claiming commissions for the sale of real estate must prove by a preponderance of the evidence that she was the procuring cause of the sale. The evidence establishes that the plaintiff brought the parties together and was the procuring cause of the sale. At the time plaintiff brought Mrs. Baba to the Gates' house any broker who procured a suitable purchaser would be entitled to a commission. The corporation had the house listed. Mrs. Wehrheim did not think that Mrs. Baba would be interested in the Gates' house because it had only two bedrooms. She thought Mrs. Baba required a house with three bedrooms. Although the Gates' house was listed for sale by the corporation, the plaintiff was the broker who brought Mrs. Baba to the house and introduced her to the owners. All of the defendants knew that plaintiff would be entitled to the commission. Mr. Gates feared that plaintiff would sue and he insisted on the indemnity agreement. When the preliminary contract was prepared two days later it recognized that plaintiff was entitled to participate in the commission. This was stricken out on the insistence of Mr. Gates. Under the evidence Mr. Gates is not in a position to assert that Mrs. Gates did not have authority to represent him in the transaction.

# Introduction

The purpose of this study is to investigate the effects of

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Finally, defendants state that a broker avers no cause of action against the purchaser of real estate where there is no contractual relation between the broker and the purchaser and that a purchaser has the legal right to refuse to perform a mere verbal agreement for the purchase of real estate. There was a valid written agreement between the seller and the purchaser who was procured by the plaintiff and she earned the commission. The evidence establishes that defendants joined in the plan to deprive plaintiff of her commission. Hence, judgment should be against all the defendants. Under the law and the evidence we find that there should be a judgment in favor of plaintiff and against all the defendants for \$900. Therefore, the judgment of the County Court of Cook County is reversed and the cause is remanded with directions to enter judgment for \$900 in favor of plaintiff and against all the defendants.

JUDGMENT REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

NIEMEYER, P.J., and  
FRIEND, J., Concur.



FILED

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

MAY 13 1957

FEBRUARY TERM, A. D. 1957

J. V. WUNDER  
Appellate Court Second District  
IN THE MATTER OF

GUS ROTHERMEL,

Alleged to be a Mentally  
Deficient Person,

Appellant.

13 I.A. 477

Appeal from the County Court  
of Kankakee County.

CROW, J.

This is an appeal by the defendant, Gus Rothermel, alleged to be a mentally deficient person, from an order of the County Court of Kankakee County, pursuant to its findings, that the defendant was a mentally deficient person and that he be committed to the Department of Public Welfare, following a petition for commitment, notice, hearing, and a report of Commissioners.

A verified petition, signed by Pearl McCorkle, as petitioner, alleging Gus Rothermel to be a mentally deficient person, was filed June 20, 1956, under the Mental Health Code, CH. 91 $\frac{1}{2}$ , ILL. REV. STATS., 1955, par. 1-1 ff, accompanied by a certificate of G. E. Irwin, M. D., that a personal examination was made of Gus Rothermel on June 13, 1956, by him, and that he found Gus Rothermel to be mentally deficient. On June 27, 1956, pursuant to the statute, after due and reasonable notice, a hearing was had before the Court, with a Commission of two physicians appointed by the Court, neither the defendant, his spouse, any relative, or

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FILED

MAY 1981

U.S. DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION

his attorney having demanded a jury trial, as any of them might have done under the statute: CH. 91 $\frac{1}{2}$ , ILL. REV. STATS., 1955, pars. 5-1, 2, 3, 4, 5. At the hearing, the defendant, Gus Rothermel, was represented by counsel, testimony was heard on behalf of both the petitioner and the defendant, an exhibit on behalf of the defendant was admitted in evidence, by stipulation, and the Commission reported by formal Report filed of record that they had made personal examination of the defendant, that they found him to be a mentally deficient person, found his birth date to be August 1, 1903, and recommended he be committed to the Department of Public Welfare. The Court found the defendant to be a mentally deficient person, and entered its Order that he be committed to the Department of Public Welfare. This appeal is taken from that Order.

The defendant's theory is that there are not sufficient facts in evidence to prove him to be mentally deficient; that most of the petitioner's evidence dealt with the condition of defendant's premises, and that his alleged mental deficiency is not of the type and extent requiring institutional care; that the facts as presented show conditions much improved from previous years, but that the petition was provoked by other factors; and that the Commissioners failed to personally examine the defendant. The petitioner urges that the evidence is adequate, the petitioner's motives, if any appear, are irrelevant, the evidence concerning the defendant's residence and conditions in life is relevant upon his mental condition, the record imports verity, and it appears of record that the Commission made a personal examination of the defendant.

The Mental Health Code, CH. 91 $\frac{1}{2}$ , ILL. REV. STATS., 1955, par. 5-5, provides as follows, in part:

THE UNIVERSITY OF CHICAGO  
DEPARTMENT OF CHEMISTRY

REPORT OF THE  
COMMISSIONERS OF THE  
LAND OFFICE

FOR THE YEAR  
1890

CHICAGO  
1891

PRINTED BY  
THE UNIVERSITY OF CHICAGO PRESS

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" \* \* \* The personnel of the commission so appointed shall be of recognized competency and integrity, and shall act together as a commission to make a personal examination of the person alleged to be mentally ill, mentally deficient, or in need of mental treatment and prepare a written report in duplicate of their findings and recommendations and deliver the same to the clerk of the court, the original to be retained in the files and, in event of a finding of mental illness, mental deficiency, or of need of mental treatment, the other copy to be delivered with the patient to the person or hospital to whom or to which the patient is committed. \* \* \* "

This Code, CH. 91 $\frac{1}{2}$ , ILL. REV. STATS., 1955, par. 1-7, defines a "mentally deficient person" as:

"\* \* \* \* any person whose mental abilities have been arrested from birth, or whose mental development has been arrested by disease or physical injury occurring at an early age, who requires care, treatment, detention and training in a hospital or under a guardian or conservator for his own welfare, or the welfare of others or of the community. \* \* \* \* "

It appears from the evidence that the appellant is fifty-two years old, married, and the father of fifteen children, two of whom are deceased; he was born in Kankakee County, attended school there until the second grade, when he left school, being then of the age of fifteen years; his occupation is collecting junk and selling it to junk dealers; prior to 1940 he was dependent on local public assistance, but since 1940 he has received State Aid to Dependent Children benefits only except recently when two of his sons have worked; he resided and centered his junk-collecting business and a little gardening business on a two and one-half acre tract south of the City of Kankakee, on State Highway No. 49, where his three-room house was occupied by himself, his wife, and ten of his children, until a few weeks before the hearing, when he, his wife, and nine of the children moved to Kankakee, to occupy a house owned by his father. The only occupation he has pursued, other than junk-collecting and occasional small-scale





truck gardening, was for one year in a Kankakee factory as a sweeper. Of the thirteen living children of the appellant, two are presently at Lincoln State School, under commitment as mentally deficient persons, one is at Kankakee State Hospital, under commitment, and of the ten at home, three, Daniel - 10, Lawrence - 13, and Marguerite - 12, are under commitment to the Department of Public Welfare, as mentally deficient persons, and are awaiting entrance to Lincoln State School.

Sometime shortly before the present proceedings, the petitioner here, who is the Juvenile Probation Officer, had, at the request of Lincoln State School, asked the defendant and his wife to execute certain papers permitting the Kankakee doctors to inform the School of the physical condition of certain of the defendant's children committed there, and the defendant declined to do so or to permit his wife to do so, he thinking they were attempting to take his children away, - the defendant was apparently sincere, but mistaken, in so thinking. Whether that had anything to do with the later filing of the petition in this proceeding is not at all clear, but if such were an immediately motivating factor, such is irrelevant, - the petitioner's motives, if any, are immaterial. If she is a reputable citizen she may file the necessary verified petition to initiate the cause, - and there is no indication she is not a reputable citizen: CH. 91½, ILL. REV. STATS. 1955, par. 5-1; Cf. MERRILL v. STEBLE (1882) 12 Ill. App. 85; CONSUMERS CO. v. CITY OF CHICAGO et al. (1924) 313 Ill. 408.

Various witnesses testified concerning specific behavior of the appellant tending to show that: the land on which the home provided by appellant for his family is located, is littered with refuse, some of which is inflammable, with human and animal offal,

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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and has been, for some time, under order of the State Fire Marshal's Office, and the chief of the local fire protection district, to be remedied as a fire hazard; appellant's children have no normal toilet facilities at that home, but are left to answer the call of nature in and about the dwelling house; they are repeated school behavior and cleanliness problems; one of the daughters, of the age of twelve years, presently committed to the Department of Public Welfare, but not yet transferred to Lincoln State School, reported at school that she had had incestuous relations with her father; appellant's children have been observed walking barefoot outside in the snow; appellant's answers to fire officials were out of reason at all times, and outrageously flighty; the appellant's attitude towards the petitioner here when she called on him at the request of neighbors or school officials was abusive; the appellant was observed, a couple of years ago, having intercourse with his wife, outside the dwelling house, in daylight, in public view; the condition in which the appellant keeps his premises is a detriment to the neighborhood, causing nearby property values to be impaired, and the conditions of unseemly behavior and neglect of property have so long continued without action by any authorities that some witnesses feel the appellant has had some kind of protection, especially in view of the fact that the petitioner has been there many times and knows the conditions; a petition was presented to the State's Attorney about a month before this hearing, signed by some of the witnesses here, requesting that something be done about the appellant and his premises. The defendant himself did not testify, nor did his wife. And neither the defendant, his attorney, or anyone else for him, objected to any of the petitioner's evidence. The evidence in such a proceed-

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1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

ing as this may take a rather wide scope and, if otherwise competent and relevant, may go into the whole history of the defendant's life and those of his close relatives as tending to show the defendant's own mental condition: IN THE MATTER OF DUNNING (1918) 211 Ill. App. 633.

The Commission consisted of Donald A. Meier, M. D., and Herbert P. Swartz, M. D., both of Kankakee. This Commission heard and participated in the examination of the witnesses before the Court. Both of the Commissioners reported in writing to the Court on the 27th day of June, 1956, that they had personally examined Gus Rothermel and found him to be a mentally deficient person and recommended he be committed to the Department of Public Welfare. There is nothing to indicate the Commission was not of recognized competency and integrity, or that they did not act together as a commission to make a personal examination of the appellant, or that they did not prepare a written report in duplicate of their findings and recommendations and deliver the same to the Clerk. Their written report, filed of record, indicating they had made a personal examination of the defendant, and there being no competent evidence to the contrary, we cannot say they failed to follow the statute as to a personal examination of the defendant. The record imports verity: Cf. IN RE CASH (1943) 383 Ill. 409.

There also appears the certificate of Dr. George Irwin, that he examined the appellant on the 13th day of June, 1956, and found him to be mentally deficient, his I.Q. less than 35%, and his mental age to be 6 years; and Dr. Irwin testified at the hearing that he had examined the defendant several times in recent years, and had formerly thought he could live outside an institution, under certain favorable neighborhood conditions, but that he had erred, and he now believed the defendant was unable to make a social adjustment because of his mental deficiency. Although Dr. Irwin had

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difficulty understanding how the defendant operated his business, the defendant at least knew how much money was due him. Dr. Irwin felt the defendant's move recently to a better house in a different community would not help. He also referred to the defendant's having associated himself with some religious group which is characterized by emotional flights, and further said his knowledge of general matters is almost totally deficient.

There also appears, by stipulation, a letter of Dr. Shpiner to the effect that, based upon information and sources stated in the letter, which was information furnished by the appellant, his father, and sister, as to the conditions of life and behavior of appellant, and also from a personal examination of the appellant at his office on June 25, 1956, and after referring to certain assumed facts, including that the defendant cannot read or write, he determined, by test, that Gus Kothersel had a gross I.Q. reflecting a mental age of 9 yrs.; that he was mentally deficient, but without psychosis; his general fund of information was fairly good despite his lack of formal schooling; and that nothing would be gained, either subjectively or socially, by committing him to an institution.

The only case cited by the defendant is HAILES, Adm. v. CEARLOCK et al. (1900) 184 Ill. 96, which involved an earlier statute as to lunatics and feeble-minded persons, and in which the Court held the statute required notice to the defendant and a hearing, and where such had not occurred that was contrary to the statute but did not involve the validity of the statute, and, hence, the Supreme Court had no jurisdiction on a writ of error. No such questions are involved in the case at bar.

We believe this record clearly shows that the appellant's mental abilities or development have been arrested and he is a mentally deficient person within the purview of the Mental Health

11th May 1944

Dear Mr. [Name]

I have your letter of the 10th May.

I am sorry to hear that you are

not well.

I hope you will get better soon.

I am, Sir, Yours faithfully,

[Signature]

[Name]

[Address]

[City]

[Country]

[Postcode]

[Phone Number]

[Telex Number]

[Fax Number]

[E-mail Address]

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Code, and that the facts and circumstances in evidence indicate that institutional care, treatment, detention, and training are required for appellant for his own welfare. The Trial Court was satisfied with the findings of the Commission and did not set the same aside: CH. 91 $\frac{1}{2}$ , ILL. REV. STATS., 1957, par. 5-7. We see no error in that. The Commission having so found, and the Court being so satisfied, the order finding the defendant to be a mentally deficient person necessarily followed, and the Court then had to commit him to the care and custody of relatives, a licensed private hospital, or the Department: CH. 91 $\frac{1}{2}$ , ILL. REV. STATS., 1957, par. 5-13. There being nothing here to indicate that any licensed private hospital had notified the Court it was willing to accept the defendant: CH. 91 $\frac{1}{2}$ , ILL. REV. STATS., 1955, par. 5-17, that alternative was not available, and the choice by the Court of the Department over any of the defendant's relatives so far as indicated herein was well within the Court's judicial discretion under the statute in the circumstances here presented.

The Court did not err in finding the appellant to be a mentally deficient person and in committing him to the Department of Public Welfare. The order is not contrary to the manifest weight of the evidence. We perceive no error of law.

The order should be, and is affirmed.

DOVE, P.J. CONCURS

A F F I R M E D.

*Corvaldi, J. Concur*

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Abstract 31

13 I.A. 570

Agenda No. 12

Appeal from the  
Circuit Court of  
Sangamon County

Defendants.

**Defendants-Appellees.**

The record in this case shows that the case was tried by jury. On May 15, 1956 the jury returned a verdict finding the defendant not guilty. No judgment was entered on the jury's verdict. Notice of appeal was subsequently served on the defendant. An inspection of the record reveals that there is no appeal in the trial court from which an appeal can be taken. Accordingly the appeal will be dismissed.

Dismissed.

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Term No. 57-F-2

## Agenda No. 5

**U R I I R**

PLAINTIFF,

VS.

CLARENCE LAUX,

DEFENDANT. )

13 I.A.<sup>2d</sup> 571

Appeal from the  
Circuit Court of  
Madison County,  
Illinois.

BARDENS, J.

Plaintiff filed a suit in the Circuit Court of Madison County to recover the cost of aluminum storm sashes and screens which he alleged were furnished as an "extra" under a contract with defendants for the purchase of a new home being constructed by plaintiff. Defendants contended such item was included in the original agreement and also counterclaimed for work done by them in finishing the house. The case was tried without a jury and judgment was entered in plaintiff's favor on both complaint and counterclaim. This appeal is based on the contention that such judgment is against the manifest weight of the evidence.

The written agreement entered into by the parties



was in the following form:

"RECEIPT

Received of Clarence Laux  
the sum of \$1,000.00 to apply on the total purchase price  
of \$16,400.00 to be paid to the undersigned for Lot 252  
in Northwoods Subdivision (on Airline Drive), in Wood  
River Township, Madison County, Illinois. The balance  
of \$15,400.00 to be paid upon completion of the dwelling  
now being constructed on said Lot 252, which completion  
shall be within 30 days from date. The undersigned to  
deliver a good and sufficient Warranty Deed and Abstract  
of Title upon receipt of payment of the balance of  
\$15,400.00.

Dated this 12th day of June A. D. 1953.

Charles R. Welch (SEAL)

Paid in Full

Accepted:

Clarence Laux (SEAL)

Minnie A. Laux (SEAL)

Plaintiff's evidence consisted solely of testimony by  
plaintiff. He contended that the house contracted for  
was to be finished with wooden storm windows, but  
that shortly after the agreement was signed, defend-  
ants asked plaintiff if he would secure combination  
aluminum storm windows for them and give them his  
contractor's discount. Plaintiff agreed to do so and  
placed an order for such windows on June 19, 1953,  
seven days after the date of the contract. On July 2,





1953, defendants paid the sum of \$15,325.00 and the contract was marked "Paid in Full." Plaintiff's explanation of the \$75.00 difference in final payment and the actual balance due is that defendants were being credited with the cost of the eliminated wooden storm windows and were to pay for the combination windows separately. When the bill for the aluminum windows arrived, plaintiff went to defendants' house and requested payment.

Defendants' evidence contradicted plaintiff's and was directed toward establishing that the combination storm windows and screens were included in the original agreement and that plaintiff accepted the \$15,375.00 as the balance in full with a clear understanding that such was the case. Testimony was also introduced as to the various alleged deficiencies in the house which had to be supplied by defendants and the cost or reasonable value thereof. Defendants' main contention is that plaintiff's claim is foreclosed by his acknowledgment of payment in full at a time when the combination windows had been ordered and that his claim for the additional sum is an afterthought. They argue that the case should be controlled by the written instruments showing payment in full.

It should first be noted that the written agreement of June 12, 1953, is not of particular help in



weighing the adverse contentions of the parties. It is denominated a "Receipt" and in fact is little more since it contains no specifications or other data usually contained in such agreements. It is obvious that oral testimony had to be introduced to give meaning to the phrase "completion of the dwelling" used in the Receipt. The trial judge, therefore, properly permitted such testimony.

In deciding the case the trial judge had to assess the credibility of the witnesses and choose between conflicting versions of the facts. We cannot reverse the lower court's conclusion unless in examining the evidence we feel that a contrary conclusion is manifestly proper. Such is not the case. The acceptance of a lesser sum than that called for by the Receipt is explained by plaintiff's contention that it was a credit for the wooden storm windows. The evidence also showed that plaintiff requested payment of the sum alleged to be due shortly after the work was done, and that one defendant recalled such incident. Such evidence is consistent with plaintiff's theory of the case and while not conclusive in itself it is sufficient to sustain the judgment against defendants' contention that it is against the manifest weight of the evidence.

We also agree with the trial court's conclusion on defendants' Counterclaim. Having made no claim



against plaintiff for services performed in finishing the house until this suit was filed, the trial judge could conclude from the conflicting testimony that there was no contract, express or implied, covering such work.

Judgment Affirmed.

Scheineman, P. J. and Culbertson, J., concur.

(Publish abstract only)



09

May Term, A. D. 1957

Agenda No. 2

13 I.A. <sup>201</sup> 571

• • • • •

Appeal from  
Circuit Court of  
Fulton County

Defendants-Appellees.

Plaintiffs appeal from a judgment of the Circuit Court of Fulton County in favor of defendants in an action to recover a real estate broker's commission on the selling price of defendants' farm.

The complaint alleges in substance that on January 4, 1955, defendants were employed by plaintiffs to sell their farm in Fulton County; that defendants agreed to pay plaintiffs a commission of 3% on the sale price thereof; that pursuant to said employment, plaintiffs procured Ross and Louise Howalter as purchasers; that on or about March 11, 1955, the farm was sold to





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May Term, A. D. 1957

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13 I.A. <sup>201</sup> 571

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Appeal from  
Circuit Court of  
Fulton County

Defendants-Appellees.

Plaintiffs appeal from a judgment of the Circuit Court of Fulton County in favor of defendants in an action to recover a real estate broker's commission on the selling price of defendants' farm.

The complaint alleges in substance that on January 4, 1955, defendants were employed by plaintiffs to sell their farm in Fulton County; that defendants agreed to pay plaintiffs a commission of 3% on the sale price thereof; that pursuant to said employment, plaintiffs procured Ross and Louise Howalter as purchasers; that on or about March 11, 1955, the farm was sold to

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CHRYSLER, J.

farm.

The complaint also stated that in November 1957, defendant were organized in Chicago, Illinois, in Union County; that defendant was employed as a commission of 3% on the sale of insurance policies; employment, plaintiff's position was and position of law-  
charters; that on or about April 11, 1958, defendant

the Howalters' for \$38,000.00; and that the agreed commission of \$1140.00 on the sale is due plaintiffs.

The cause was tried by the court without a jury. No questions are raised on the pleadings. The fact that the farm was purchased by the Howalters as alleged in the complaint is not disputed.

The sole question raised and argued in plaintiffs' brief is whether plaintiffs were the procuring cause of the sale upon which they claim a commission. We are not concerned with any issue in connection with their employment, although the same was contested in the trial court.

As a general rule, where a transaction which a broker is employed to negotiate is consummated, the broker is entitled to his commission if he is the efficient, procuring cause of the transaction and unless he is such procuring cause, he is not entitled to his commission. I.L.P. Brokers, Sec. 79. Murawska v. Boeger, 219 Ill. App. 241; Kurtz v. Evans, 201 Ill. App. 180.

The burden of proving this essential element of their case rested upon plaintiffs. Whether they met this burden of proof was a question to be decided in this case by the court as a trier of the facts. A review of its decision entails some examination of the proofs bearing upon this issue as the same are reflected by the record.

the Howalters' for \$38,000.00; and that the agreed commission of

\$110.00 on the sale is due plaintiffs.

The cause was tried by the court without a jury. No

questions are raised on the pleadings. The fact that the firm was

purchased by the Howalters as alleged in the complaint is not dis-

puted.

The sole question raised and argued is whether the

brief is whether plaintiffs were due a commission on the sale

upon which they claim a commission. There is no controversy

any issue in connection with their employment. The only issue

was contested in the trial court.

As a general rule, where a person is employed to negotiate

is employed to negotiate in connection with the sale of property

to his commission if he is the effective agent of the principal

transaction and unless he is an independent contractor.

entitled to his commission. 111 Ill. App. 2d 111, 112

v. Boeger, 219 Ill. App. 2d 111, 112; 113 Ill. App. 2d 111, 112

180.

The burden of proving this fact is on the plaintiff.

their case rested upon the fact that the Howalters were

burden of proof was a question to be decided by the court.

the court as a trier of fact. A review of the facts

entails some examination of the proof presented by the parties

as the same are reflected by the record.

Merrel Edsall, Sr., one of the plaintiffs, testified that he first talked with the defendant Chester A. Creek on January 4, 1955 at which time he learned the location of the farm which was in Lee Township, Fulton County, its acreage and improvements; that Creek wanted \$45,000.00 for the farm with the livestock thereon or \$40,000.00 without the livestock; that he asked Creek if the farm was listed for sale anywhere and Creek replied that a Ted Fitzhenry had it on open listing; that about February 1, 1955, he went to the home of Ross and Louise Howalter and talked to them about the Creek farm; that the Howalters' desired to look at the farm; that the following morning he and the Howalters' went to the defendants' farm and inspected it; that the Howalters' then told him that if they could get rid of their farm they would like to have the Creek farm; that the same day he and the Howalters', at the suggestion of the latter, went to Canton to see Creek; that Ross Howalter and defendant had met before; that they talked and after their conversation in which Edsall did not participate, the latter asked Creek if he would be interested in taking the Howalters' small farm in on a trade for his larger acreage; that Creek told Edsall he would not be interested in such a trade; that witness then tried to sell the Howalters' small farm but was unable to do so; that the witness never talked with defendants again with reference to the sale of the Creek farm until after it

General Smith, Jr., one of the plaintiffs, testified

that he first talked with the defendant Chester A. Greer on

January 11, 1955 at which time he learned the defendant was then

working for the defendant, John Greer, at the defendant's home

in Memphis; that Greer owned 10,000.00 shares of the defendant's

stock shares or 10,000.00 shares of the defendant's stock

Greer is the first witness listed for the defendant's case

and that Greer had been operating the defendant's business

in 1955, he was a partner in the defendant's business

to the extent of the defendant's stock; that Greer had

been a partner in the defendant's business since 1955

to the defendant's business; that Greer had been a partner

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business since 1955 and that Greer had been a partner in the

was sold on March 11, 1955; that on March 21, the witness learned of the sale of the farm to the Howalters', went to see the defendant and demanded a commission on the sale.

Ross Howalter testified that he bought the Creek farm on March 11, 1955 for \$38,000.00; that he knew this farm was for sale in early January, 1955; that Merrel Edsall did not know the name of the owner or location of the Creek farm when he called to see the Howalters' on February 10, 1955; that Edsall did not know the price which Creek was asking for his farm; that the trip to Canton made by the Howalters' and Edsall was to learn Creek's price; that Creek stated he wanted \$40,000.00 for the farm; that the witness asked Creek if he would take the Howalter farm as a down payment; that Creek said he was not interested; that witness then told Creek to forget the whole thing because if they couldn't trade the Howalters' could do nothing; that Edsall took no part in this conversation; that Edsall did not see the witness again until March 10, 1955 when the latter called at his office concerning the sale of the Howalters' farm; that on March 9, 1955 a brother of the witness offered to furnish him the money to buy the Creek farm; that the next day witness telephoned Creek and offered \$38,000.00 for the farm; and that Creek then said he would sell at that price if he didn't have to pay a real estate commission.





The testimony of Louise Howalter, wife of Ross Howalter, appears to substantially corroborate that of her husband.

Chester Creek, one of the defendants, testified that he decided to sell his farm about January 1, 1955; that he placed it with a Mr. Fitzhenry of Canton and a Paul Yeager; that he first met Merrel Edsall on January 4, 1955 in Miller's Auto Body in Canton; that the next time he saw Edsall was when he came into the Body Shop with Howalter on February 11, 1955; that on that occasion he had a conversation with Howalter in which Edsall took no part; that he did not again see Edsall until the latter demanded a commission on March 21, 1955; that Edsall never advised witness that he had a buyer for his farm.

The foregoing would appear to be substantially all of the evidence relating to the question as to whether plaintiffs were the procuring cause of the sale upon which they claim a commission. Examination thereof establishes without dispute that Merrel Edsall's only contact with the purchasers relative to the transaction in question was on the occasion of the visit to the Creek farm about March 1, 1955; that the only result thereof was the proposal by the Howalters' that Creek take their small farm as a down payment; that Creek refused to consider such proposition; and that Ross Howalter then in the presence of Edsall, told Creek he might as well forget the whole thing. Significantly absent is any evidence tending to show that subsequently the plaintiffs



did anything by way of an effort to close a sale transaction between the parties. Plaintiffs knew that Creek would not consider the trade offered by Howalter and that was the only proposition discussed following the Howalters' inspection of the farm. Negotiations between the parties would appear to have then ended. The fact plaintiff made no effort to induce Creek to change his mind concerning a trade and did not suggest any plan for working out a sale to either of the parties is strong evidence that they entertained no further thought of finally getting the parties together. We think the evidence tends to show that plaintiffs in fact did abandon all interest in closing a sale of the Creek farm after Creek told Ross Howalter that he was not interested in taking the Howalters' farm in trade.

It also may be further observed that this is not a case where a sale was consummated as a result of a broker bringing a seller and prospective purchaser together. Here the evidence shows the purchasers knew the Creek farm was for sale and did meet Chester Creek prior to plaintiffs' talk with them.

The trial court after hearing the testimony of all the witnesses, and having had the opportunity of observing them as they testified, reached the conclusion that the evidence on the issue as to whether plaintiffs were the procuring cause of the sale, preponderated in favor of defendants.

did anything by way of an effort to close a sale transaction  
between the parties. Plaintiff has the Great North all com-  
sider the trade offered by defendant and that was a very prop-  
osition disclosed following the 15th of April, 1904, of the  
firm. Negotiations between the parties to the 15th of April, 1904,  
ended. The fact plaintiff made no effort to induce defendant  
to change his mind concerning a trade and that plaintiff did  
for working out a sale to defendant. Plaintiff was not aware  
that they represented an offer to sell to defendant. This  
parties together. The 15th of April, 1904, and the 15th of  
plaintiff's 15th of April, 1904, and the 15th of April, 1904,  
of the Great North defendant told plaintiff that he was not  
not interested in the 15th of April, 1904, and the 15th of  
15th of April, 1904, and the 15th of April, 1904, and the 15th of  
case where a sale was made to defendant. Plaintiff was not  
a sale of a large quantity of goods to defendant. Plaintiff  
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the 15th of April, 1904, and the 15th of April, 1904, and the 15th of

A fundamental rule followed by reviewing courts is that the findings of the trial court, who has had an opportunity to personally observe and hear the witnesses, will not be disturbed unless contrary to the manifest weight of the evidence. Burrows v. Palmer, 10 Ill. 2d 344.

Since upon this record we cannot say that the trial court's conclusion was against the manifest weight of the evidence, its judgment will be affirmed.

Affirmed.

Judge Roeth took no part in the consideration of this case.

A fundamental rule followed by reviewing courts is that the findings of the trial court, who has seen the evidence, are to be respected unless clearly erroneous. It is not the duty of the reviewing court to personally observe and weigh the evidence, but to determine whether the trial court's findings are supported by the evidence.

Barrow v. Barrow, 10 Ill. 2d 111.

Since upon this record the court's conclusion is supported by the evidence, its judgment will be affirmed.

Affirmed.

Very truly yours,  
[Signature]

910

Abstract

STATE OF ILLINOIS

MAY TERM, A.D. 1957

General No. 10118

Agenda No. 16

Josephine Bova,

Plaintiff-Appellant,

vs.

Charles Keller and Marguerite Keller,

Defendants-Appellees.

13 I.A. <sup>2d</sup> 572

Appeal from  
Circuit Court of  
Jersey County

Roeth, J.

On May 14, 1954 plaintiff filed her complaint against defendants alleging that she was the owner of certain real estate; that the defendants were occupying said real estate under a month to month tenancy requiring the payment of \$30.00 per month as rent; that defendants had failed to pay the monthly rental from and including April 1, 1953; that a 5 day notice had been served upon defendants requiring the payment of the rent due by May 3, 1954, in default of which the tenancy would be terminated; and that defendants had failed to comply with the notice. Plaintiff prayed for possession and a judgment for the rent then due. By answer and an amended counterclaim defendants denied plaintiff was the owner and alleged that a warranty deed from defendants to plaintiff was in fact a

Abstract

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STATE OF ILLINOIS

WEST HIA, WEST Y.M.

of the year

General No. 10118

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Josephine Love,

Josephine Love,

and

Charles Keller and

Charles Keller and

Josephine Love,

On May 14, 1934, the State of Illinois, by and through its

Attorney General, filed a petition in the Circuit Court of Cook County, Illinois, for

the appointment of a receiver to take possession of the property of the

defendants herein, and for the appointment of a receiver to take possession of the

property of the defendants herein, and for the appointment of a receiver to take possession of the

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property of the defendants herein, and for the appointment of a receiver to take possession of the



mortgage given to secure the payment of a loan of \$2000.00; that defendants have paid \$30.00 per month on account of the loan of \$2000.00 and praying that upon payment of the balance found to be due on said loan that said deed be held for naught and a reconveyance to defendants ordered.

Upon the issues thus made, the case was tried before the court without a jury. The court found the issues for the defendants on their counterclaim; found the balance due as \$736.86; and directed a reconveyance of the real estate upon payment of the said amount. This appeal is prosecuted by the plaintiff from that decree.

By Section 12 of the Mortgage Act (Ill. Rev. Stat. 1955, Chap. 95, par. 13,) it is provided that every deed conveying real estate which shall appear to have been intended only as security and in the nature of a mortgage, shall be considered as a mortgage. The law is firmly established, that a person who seeks to establish that a deed, absolute in form, is in fact a mortgage must establish this by clear, satisfactory, and convincing evidence. A conveyance takes effect from its delivery, and the question whether it was a deed or a mortgage becomes fixed at that time. The decision of that question depends upon the intention of the parties at the time of the execution. In determining the question a court may consider not only the preliminary negotiations but also the statements and conduct of the parties both at and subsequent to the execution of the instrument. Totten v. Totten, 294 Ill. 70, 128 N.E. 295; Kulik v. Kapusta, 303 Ill. 208, 135 N.E. 402; Illman v. Kruse,



301 Ill. 408, 134 N.E. 107; Tepper v. Campo, 398 Ill. 496, 76 N.E. (2d) 490; Warner v. Gosnell, 8 Ill. 2d 24, 132 N.E. (2d) 526 and cases therein cited. It therefore becomes advisable to review the testimony at some length in order to resolve the question between the contending parties.

Defendants commenced the operation of a tavern business in 1942 in property then owned by a Mrs. Ball. The real estate and building thereon were located in the midst of the Pere Marquette State Park area. Sometime in 1944 the building was destroyed by fire. Defendants contacted Mrs. Ball about the reconstruction of the building. She was reluctant to rebuild at her expense but agreed that defendants might do so at their expense and that if the real estate was ever sold defendants should have the first chance to purchase. Defendants rebuilt the building and from that time on, as between defendants and Mrs. Ball, the building was regarded as belonging to defendants. During this time the defendants and plaintiff and plaintiff's deceased husband were good friends and visited back and forth socially and plaintiff's husband undertook to advise defendants from time to time on business matters.

In 1948 Mrs. Ball decided to sell the real estate. She contacted her attorney and authorized him to sell the property to the defendant Charles Keller for \$2000.00 if he could raise the money, and if he could not, to find a purchaser for it for what the attorney felt the property was worth or its fair cash market value. The attorney contacted the defendant Charles Keller and explained his instructions to him. Keller thereupon said he was interested and would try to raise the money. A short time later Charles Keller

301 Ill. 408, 134 N.E. 107; Tanner v. Gamm, 398 Ill. 490, 76 N.E. (2d) 490; Warner v. Gamm, 8 Ill. 2d 34, 132 N.E. (2d) 526 and cases there-

in cited. It therefore becomes advisable to review the testimony at some length in order to resolve the question between the contending parties.

Defendants commenced the operation of a tax and business in 1942 in property then owned by a Mrs. Hall. The first building thereon were located in the 14th of the First Commercial State Park area. Sometime in 1944 the building was destroyed by fire. Defendants contacted Mrs. Hall about the reconstruction of the building. She was reluctant to rebuild at her expense but agreed that defendants might do so at their expense and that the real estate was even sold. Defendants should have the right to do so to purchase. Defendants recall the building and then the building on, as between defendant and Mrs. Hall, the building was destroyed as belonging to defendants. During this time it was determined that plaintiff and plaintiff's brother and sister were going to visit back and forth and plaintiff's brother and sister were to advise defendants how time to be on the building. In 1945 Mrs. Hall decided to sell the building and the building was contacted her attorney and authorized him to sell the building to the defendant (Charles Keller for \$25,000.00) and the building was money, and if he could not, he time a mortgage for \$25,000.00. attorney felt the property was worth on the fact it was a building. The attorney contacted the defendant (Charles Keller) and advised his instructions to him. Keller thereupon said he was later and would try to raise the money. A short time later Charles Keller

advised the attorney that he had raised the money and would bring the people into his office. From this point on, there is a sharp conflict in the testimony.

To sustain their counterclaim defendants first called the plaintiff under Sec. 60. She testified that Charles Keller first contacted her husband about a loan of \$2000.00. Her husband consulted the plaintiff who appeared to have funds of her own. The plaintiff was unwilling to loan Keller any money. She further testified that later Charles Keller contacted her personally at her place and asked her to loan him the money, but that she told him she would not make a loan but would buy the real estate and permit him to remain in the tavern business. According to plaintiff, Keller being aware of Mrs. Ball's desire to sell to him, told the plaintiff that the only way this could be done was to purchase the property in Keller's name and then turn it over to plaintiff. Plaintiff says that they thereupon agreed that this should be done and that Keller would have Mrs. Ball's attorney prepare the necessary papers. The plaintiff testified that at this same conversation Charles Keller agreed to pay \$30.00 per month and the taxes as rent.

Thereafter the parties met in the office of Mrs. Ball's attorney. Plaintiff says she told the attorney that she was buying the property and that he would have to transfer the title over to Charles Keller and from him to her. At this time \$500.00 of earnest money was paid, as the plaintiff says, by her, out of her funds. Plaintiff and her husband and the defendants later returned to the

advised the attorney that he had retained the money and was bringing  
the people into his office. This being so, there is a  
conflict in the testimony.

To ascertain their competence, the witness

the plaintiff under Sec. 60, and that the defendant

first contacted the plaintiff and asked for the money

convinced the plaintiff and asked for the money

The plaintiff was unable to pay the money

plaintiff and asked for the money

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attorney's office whereupon she paid the balance of the \$2000.00 and received two deeds, one from Mrs. Ball to the defendants and one from the defendants to her, which she recorded and has since kept in her possession. Throughout her testimony plaintiff insisted that she had not intended to loan Charles Keller any money but that at all times she intended to buy the real estate and considered herself to be the owner of the real estate and the defendant Charles Keller to be the owner of the building.

The defendant Charles Keller testified that he first discussed the matter of a loan with plaintiff's husband and the husband's nephew. He later had a conversation with these same parties at which plaintiff was present and at which plaintiff agreed to loan him the money. Keller testified to some discussion at this time and before going to the attorney's office, regarding the formation of a partnership arrangement under which the plaintiff and her husband would buy the ground and in addition put up enough cash to match Keller's building and inventory. The nephew would then become a partner and he and Keller would improve the property and operate the business, dividing the profits. In testifying to this discussion Charles Keller said:

"They (meaning the Bovas) wanted to put up the same amount of money that I had invested there, and the ground, to go in business with me, the money was to put up cabins and to modernize the tavern." (Emphasis ours)

The formation of this partnership never materialized but was still the subject of discussion between the parties on the occasion of





the visits to the attorney's office. Keller testified that plaintiff paid the initial \$500.00 to the attorney and requested that the abstract be continued and requested a title opinion. He testified that although plaintiff paid the money and received the deeds and abstract and title opinion, he thought she was loaning the money to him to buy the ground. As to the \$30.00 per month that he was to pay to plaintiff, Keller says that plaintiff told him he should pay this amount pending the completion of the partnership arrangement and that he thought these payments would be applied on the \$2000.00 with an adjustment to be made when the partnership was completed.

The record also shows that when Keller sent the \$30.00 payments to plaintiff she would return a rent receipt. In 1952 Keller sent plaintiff a letter enclosing a check for \$175.32 "which according to our books is due you for balance of 1951 and January and February of 1952. Also \$55.32 for taxes". In this letter they advised plaintiff they were planning on selling the tavern. In 1953 Keller wrote plaintiff, "Enclosed please find check for \$300.00. I would like a statement for the amount of rent sent in". In 1948 defendant Keller requested a lease from plaintiff, which he obtained, to enable him to secure a liquor license. With the exception of the year prior to the commencement of this suit plaintiff paid the taxes and was reimbursed for the same by the defendants. The last year the defendants paid the taxes direct.



The attorney for Mrs. Ball testified on behalf of defendants. He testified to the preliminary negotiations with Charles Keller concerning the sale of the real estate and the occasions of the visit by all parties to his office. He couldn't remember who paid the money, whether the plaintiff or her husband. He denied that plaintiff told him she was buying the property but testified that nothing was ever said in his office as to whether plaintiff was purchasing the property or whether the transaction was a loan. Plaintiff did inquire of him whether the title was good and he gave his opinion that it was and furnished a written title opinion to this effect. He overheard part of the conversations regarding the formation of a partnership and says that he regarded the transaction involving the real estate as a security transaction having the impression that the land, building, equipment, bar and improvements would ultimately become partnership property. Yet when asked by plaintiff what he thought of the value of the property he told her that if she could buy it for \$2000.00 she was getting a bargain. The fact that it was a bargain appears from evidence. The value of the real estate at the time was in excess of the \$2000.00 and since then it has appreciated in value.

Although the defendant Marguerite Keller was present at various times during various conversations between the parties, she was not called as a witness on her own behalf and that of her husband to give her version of what took place. The failure to call her as such a witness is not explained by the record although

The attorney for the defendant is called on behalf of

defendants. He testified to the defendant's negotiations with

Charles Heller concerning the sale of the real estate and the

operations of the state by which the defendant is now

represented who had been a partner in the business of the

defendant since the defendant's death and who had been

associated with the defendant since the defendant's death

plaintiff was the defendant's partner in the business of the

was a local business and the defendant was a local

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it appears that she was present during the trial of the case.

From the foregoing analysis of the record in this case, we think it clear that at the time Mrs. Ball decided to sell the property in question she was on friendly terms with defendants and desired to give them the first opportunity to purchase the real estate since they already owned the building, so as not to disturb them in their business. Defendants did not have the money to purchase. Their main concern was some arrangement to keep them in at least as good a position as when Mrs. Ball had owned the property. It is reasonable that they would turn to good friends to accomplish this purpose. By securing the plaintiff to purchase the property they were able to maintain their status quo for over 6 years. The testimony of Charles Keller with reference to the discussions about a partnership arrangement, lend substantial weight to the view, that while said discussions were going on, he considered plaintiff to be the owner of the land. The reference by Keller in the letter of 1953 to the payment as being for rent, and the execution of the lease are additional circumstances that he considered plaintiff to be the owner.

Defendants strenuously argue that their continuing in possession after their deed to plaintiff and payment of taxes by them is strong evidence to show that the deed was intended to be a mortgage, citing Totten v. Totten, supra. The language of the court in that case is that continued possession and payment of taxes by a grantor is strong evidence tending to show that a deed is in fact a mortgage. This necessarily pre-supposes that the grantor

it appears that she was present during the trial of the case.

From the foregoing analysis of the record in this case,

we think it clear that at the time Mrs. Bell decided to sell the property in question she was on friendly terms with certain persons desired to give them the first opportunity to purchase the real estate since they already owned the property, so as not to disturb

them in their business. Furthermore, the fact that they

purchased their main concern was more important to her than

in at least as good a position as when they sold it to her and

property. It is reasonable that they would want to retain the

to accomplish this purpose. By securing the property to sell

the property they were able to maintain it in the hands of the

years. The testimony of certain witnesses is to the effect that

discussions about a partnership arrangement were held in 1921, and

to the view, that while said discussions were being held, the

plaintiff to be the owner of the land. The fact that the

the letter of 1922 to the plaintiff in fact, the same was

of the issue and a judicial determination had been made in 1921

to be the owner.

Defendants argue that the fact that the plaintiff

possession after their need to liquidate the business was

them in strong evidence to show that the fact that the

a mortgage, citing Jetter v. Jetter, 1922, 100 Cal. 100, 101

court in that case in fact determined that the mortgage was

by a grantor is strong evidence to show that the fact that the

fact a mortgage. This is especially so where the mortgage

was in possession and paying taxes as the owner, prior to the deed. There, the grantor in the deed had been in possession and had paid the taxes prior to the deed and continued in possession and continued to pay the taxes after the deed. In the case at bar Keller was never in possession of the real estate as owner prior to his deed. The record in this case is barren of any facts or circumstances tending to show that Keller ever exercised any dominion over the real estate or claimed to be the owner of it, after the execution of the deeds and prior to the commencement of this suit. With it being conceded that he was the owner of the building, his continued possession of the building is not inconsistent with plaintiff's claimed ownership of the real estate and the consequent right to possession. In fact at one time Keller sought to sell the tavern but couldn't because he did not have title to the real estate. Although fully aware of this situation for more than 2 years prior to the commencement of this suit he made no claim of ownership to plaintiff and took no action until plaintiff commenced this suit for possession of the real estate. As to the taxes, they were actually paid by plaintiff and she was reimbursed for them. Furthermore defendants claim in this regard assumes the very fact in question, namely that he was in possession and paying taxes as owner and not pursuant to the landlord-tenant agreement.

was in possession and paying taxes as the owner, prior to the deed. There, the grantor in the deed had been in possession and had paid the taxes prior to the deed and continued in possession and continued to pay the taxes after the deed. In the case at hand Keller was never in possession of the real estate as owner prior to his deed. The record in this case is barren of any facts or circumstances tending to show that Keller ever exercised any dominion over the real estate or claimed to be the owner of it, after the execution of the deed and prior to the commencement of this suit. With it being conceded that he was the owner of the building, his continued possession of the building is not inconsistent with plaintiff's claimed ownership of the real estate and the consequent right to possession. In fact at one time Keller sought to sell the tavern but couldn't because he did not have title to the real estate. Although fully aware of this situation for more than 2 years prior to the commencement of this suit he made no claim of ownership to plaintiff and took no action until plaintiff commenced this suit for possession of the real estate. As to the taxes, they were actually paid by plaintiff. If any taxes were paid for them. Furthermore defendant claims in this report against the very fact in question, namely that he was in possession and paid taxes as owner and not pursuant to the landlord-tenant contract.



Defendants urge that the findings of the chancellor who saw and heard the witnesses testify are entitled to much consideration and should not be disturbed unless palpably erroneous. This undoubtedly is a correct statement of the law. While the chancellor's findings are entitled to weight, a reviewing court has the power to overrule his findings, if he was in error.

It is our opinion that the defendants have not met the burden of proof required of them. The transaction here involved constituted a purchase of the real estate by plaintiff and was not one giving rise to an indebtedness which could be secured by a mortgage. The plaintiff proved the allegations of her complaint and was entitled to a judgment for the possession of the real estate and the rent due. The defendants are the owners of the building and should have a reasonable time to remove it.

Accordingly the decree of the Circuit Court of Jersey County will be reversed and the cause will be remanded for such further proceedings as are consistent with the views herein expressed.

Reversed and remanded.

Defendants urge that the findings of the chancellor who saw and heard the witnesses testify are entitled to much consideration and should not be disturbed unless palpably erroneous. This is not only a correct statement of the law. While the chancellor's findings are entitled to weight, a reviewing court has the power to overturn his findings, if he was in error.

It is our opinion that the defendants have not met the burden of proof required of them. The foundation was laid, constituted a purchase of the real estate by plaintiff and defendant one giving rise to an indebtedness which could be secured by mortgage. The plaintiff proved the execution of her mortgage and was entitled to a judgment for the possession of the property and the rent due. The defendants are the owners of the property and should have a reasonable time to remove it.

Accordingly the decree of the circuit court of Jefferson County will be reversed and the case will be remanded for further proceedings as are considered proper by the court. Costs expressed.

Reversed and remanded.

47053

RADCLIFFE O. WOOLFORD,

Appellee,

v.

PERFECTION MOTORS, INCORPORATED,  
a corporation,

Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

13 I.A. 573<sup>2d</sup>

JUDGE McCORMICK DELIVERED THE OPINION OF THE COURT.

A suit was filed in the Municipal Court of Chicago by the plaintiff seeking to recover from the defendant damages for the loss of his automobile in a fire which destroyed the defendant's public garage. At the time of the fire the automobile of the plaintiff was in the possession of the defendant, having been left with it for greasing and an oil change. The case was tried before a jury, which returned a verdict in favor of the plaintiff, assessing his damages at the sum of \$1400. The defendant thereupon made motions for judgment notwithstanding the verdict and in the alternative for a new trial, which motions were denied by the trial court. Judgment was entered in favor of the plaintiff and against the defendant for \$1400, from which judgment this appeal is taken.

The defendant in this court has confined himself to only one issue. It contends that it proved as a matter of law at the trial that it was not guilty of negligence and, therefore, that the court erred in not entering judgment notwithstanding the verdict in favor of the defendant.



-2-

The defendant does not question that the plaintiff made out a prima facie case.

The only evidence introduced by the defendant was that of one Litchinger, its vice president and treasurer, who was out of town the day of the fire. In his testimony, after describing the garage, he stated that the premises were almost entirely destroyed by the fire; that at the time of the fire 60 or 70 automobiles on the premises were damaged to some extent; that at the time of the fire there were 12 to 16 fire extinguishers around the premises; that there were on the premises underground gasoline tanks containing gasoline, and welding torches; that neither the tanks nor the welding torches exploded; that the furnace in the basement was not harmed; that the men working about the shop were provided with a can in which to keep oily rags and they were supposed to clean up all rubbish and trash and wash out the stall in which they had been working with water and a detergent which would absorb any grease or oil that might be left on the floor. He further testified that he did not know whether they cleaned up the premises on the night of the fire, nor did he know when the shop had been cleaned with a grease solvent before the occurrence; that there were no fire doors on the premises; that the fire occurred during the night; that there was a watchman, a man in his middle-late sixties, on duty at the time; that the watchman died prior to the trial; that a part of the duties of the



-3-

watchman was to sweep the floor after the mechanics left; that in his opinion the watchman was a trustworthy employee; that no reason for the fire had been found by the fire department of the City of Chicago in its investigation. Plaintiff in his testimony also stated that he did not know the cause of the fire.

The only question before us is whether on the testimony which it had before it the trial court was in error in not entering judgment notwithstanding the verdict.

In Kammerer v. Graymont Hotel Corp., 337 Ill. App. 434, quoting from Brenton v. Sloan's United Storage & Van Co., 315 Ill. App. 278, the court said:

"Under the law of this State a bailor makes out a prima facie case as against a bailee by showing that the goods which have been bailed have not been returned upon demand, and such a prima facie case is not overcome by a mere showing to the effect that the goods have been burned, or otherwise destroyed (Byalos v. Matheson, 328 Ill. 269; Clemenson v. Whitney, 238 Ill. App. 308, 313 \* \* \*).

"To discharge himself from liability under such circumstances a bailee must show that the loss occurred without his fault and whether he has met his burden is a question of fact for the jury to decide (Lederer v. Railway Terminal & Warehouse Co., 346 Ill. 140; Byalos v. Matheson, supra; Clemenson v. Whitney, supra.)

"As was stated in the case of Heyman & Bros., Inc. v. Marshall Field & Co., 301 Ill. App. 340, at page 346: "In such case the bailee, before he is relieved from liability, must show that the loss, theft, or destruction by fire, was not the result of any negligence on his part." Unless all reasonable minds would agree that the defendant has shown the degree of care required of such bailment, the determination of the issue of due care becomes a question for the jury. Ostensibly, this rule is an outgrowth of a recognition of the practical difficulty which a bailor would have in trying a bailment case, and places the burden on

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the defendant to explain the circumstances surrounding the loss of the goods. Plaintiffs, in such cases, usually are not in a position to rebut defendant's evidence and it is the omissions and weaknesses of the defendant's case that become vital for consideration of the jury in determining the question of due care."

In the case before us the plaintiff had made out a prima facie case. The only evidence introduced by the defendant with reference to its lack of negligence was the evidence of the witness Litchinger as to what directive had been imposed upon the employees with reference to keeping the premises free from oil and rubbish and disposing of oily waste, which was admittedly used in their work, together with a foreclosing of the possibility of the fire having originated in the gas tanks, the furnace or the welding torches. No witnesses were produced by the defendant who were present at the garage the day of the fire, nor is any reason given why they were not called. The defendant's evidence is not of such a conclusive character that all reasonable minds must agree that the defendant has proved that the loss occurred without his fault.

The defendant also contends that because the plaintiff in his complaint alleged that the defendant was guilty of "malfeasance or misfeasance" he was held to a higher degree of proof. The allegation was no more than a general allegation of negligence. Chicago City Ry. Co. v. Jennings, 157 Ill. 274. In any case, the type of allegation in the complaint would have no effect on



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the well recognized rule governing actions by bailees.

The trial court properly submitted the issues to the jury and was correct in overruling the motion for judgment notwithstanding the verdict. The judgment of the Municipal Court of Chicago is affirmed.

Judgment affirmed.

Robson, P. J., and Schwartz, J., concur.

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47069

GEORGE F. CONLEY COMPANY,  
a corporation,

Appellee,

v.

MARVIN LANGHAUS,

Appellant.

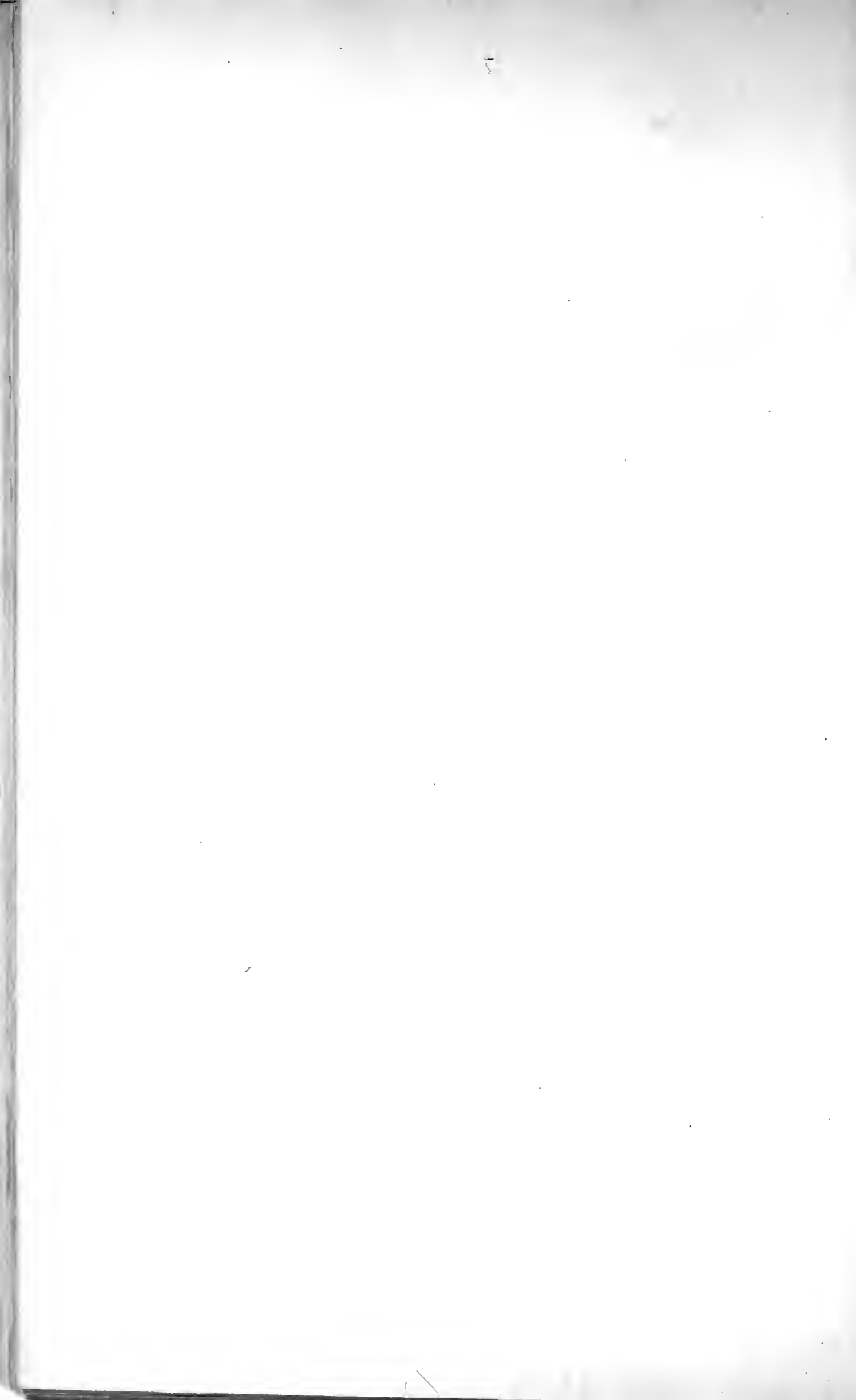
13 I.A.<sup>2d</sup> 574

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

JUDGE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff's truck was damaged in a collision with defendant's automobile August 28, 1954. The case was tried by the court without a jury. Liability was conceded by defendant, and the only issue was one of damages. After hearing the evidence the court found for plaintiff in the amount of \$1888.72, \$1288.72 being for repairs to the truck and \$600 for loss of profits.

Defendant, on appeal, first urges that plaintiff should have mitigated its damages by replacing the truck instead of repairing it. He argues that the manifest weight of the evidence establishes that a comparable truck could have been purchased for \$650. Adding to this figure the cost of special equipment, lettering and painting on the damaged truck and then deducting the salvage value, brought defendant's estimate of plaintiff's total loss to \$752, a figure about \$500 less than the cost of the repairs. Where property has been damaged by a defendant and can be repaired, the true measure of the damages is the reasonable cost of the repairs, providing it is less than the value of the



property before damage. Santiemmo v. Days Transfer, Inc., 9 Ill. App.2d 487, 502; McDonell v. Lake Erie & Western Ry. Co., 208 Ill. App. 442, 454. Defendant's legal position is sound, but we must consider whether it is supported by the evidence.

Defendant produced two witnesses who were experienced in the business of appraising, buying and selling used cars and trucks. Neither of them had ever seen the damaged truck and neither knew its true condition or amount of mileage. Their testimony supports the contention of defendant, but both had to assume facts which may or may not have been true with respect to the damaged truck.

On the other hand, plaintiff's witness testified that he had been in the business of repairing trucks for 25 years, that he had repaired thousands of them, and that in connection with that business he acquainted himself with current values of all makes of trucks. He further testified that he was familiar with the value of the truck in question, and that when called upon to make repairs he took into consideration whether it would not be better to declare a particular vehicle a total loss. At the time plaintiff's truck came to his shop, he checked the current markets for a similar truck and found that none was available. He testified that if one had been available it would have cost in the neighborhood of \$1250, and in addition they would have had to equip the truck with the facilities of the damaged truck and to paint and reletter it to specifications. This would have

the evidence, is sound, but we must consider whether it is supported by

to being and whether it is specifications. It would have  
equip the truck with a million of the damaged truck and  
retailers of 1967, and in addition they would have had to  
find that it was not even available in 1967, and in the  
attain to it and found that none was available. The last  
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and that when I was upon to make repairs he was into con-  
that he was for the truck. He was the truck in question,  
current value of all makes of trucks. He was a certified  
connection with that truck. He was a certified truck with  
years, that he had repaired thousands of trucks, and that in  
that he had been in the business of repairing trucks for 25  
in the other hand, plaintiff's truck was certified  
or way not have been there with respect to the damaged truck,  
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of amount of mileage. Their truck is a 1967, the contin-  
seen the damaged truck and either knew the truck was in  
selling used cars and trucks. Neither of them had ever  
experienced in the business of repairing, buying and  
Defendant produced two witnesses who were



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brought the total well over the cost of repairs. The evidence was adequate to support the finding that the cost of repairs was \$1288.72 and that plaintiff properly proceeded with the repair of the truck.

In addition to \$1288.72, the amount of the repair bill, the court allowed \$600.00 for loss of profits. On this phase plaintiff produced a witness who testified that he was regularly employed in preparing cost statements, balance sheets and doing all other accounting work for plaintiff's company. He testified that he had been requested to figure the loss per day on the damaged truck. He said "Our computed costs per day of operating a truck is \$25 to \$27. We prepare estimates so that they will result in a 25 - 35 percent gross profit." In answer to another question, he said "The average per day of profits on a truck, off hand, I would say that that truck would take in probably \$20 to \$25." On cross-examination he testified that he knew of no jobs which were lost as a result of the truck not being available. When asked the exact number of days the truck was out of operation he said "I will say six to eight weeks." He testified that the \$25 cost factor per truck included insurance, workmen's compensation, gas, oil, maintenance, depreciation and other items. He testified on cross-examination that job prices are estimated on a basis of profit which would yield 25 to 30 percent on gross sales; that "the loss to plaintiff each day the truck in question was laid up was \$25 a day plus 35 percent



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profits on sales...[that] the loss of profit would be about \$15 a day over and above expenses." George F. Conley testified that 30 days elapsed between the date of the accident and the day he put the truck back on the street -- "about thirty working days." The trial court apparently took the figure of \$20 and multiplied it by thirty, making \$600. However, we have noted that at one time plaintiff's accountant testified that the truck "would take in probably \$20 or \$25," and at another, that the loss of profit was \$15 per day; also that the cost factor included insurance, workmen's compensation, gas, oil, maintenance, depreciation and other items. Plaintiff has vehemently argued that loss of profits is difficult to prove with minute particularity. Courts recognize that fact. But an accountant or bookkeeper knows or should know the figures upon which an estimate is made and he should testify with clarity and candor and not with palpable determination to boost the profits, as appears to have been done in the instant case. The testimony is so conflicting and confused on this question that we do not see how any court could arrive at a reasonable determination of the loss of profits, if any.

Upon the filing of a remittitur of \$600 by plaintiff in the office of the clerk of this court within ten days, thereby reducing the judgment to \$1288.72, the judgment will be affirmed; otherwise judgment will be reversed and the cause remanded for a new trial.

Judgment affirmed upon the  
filing of a remittitur.

Robson, P. J., and McCormick, J., concur.



47120

13 I.A. 574

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

v.

ALVIN C. RITHAMEL (Impleaded),

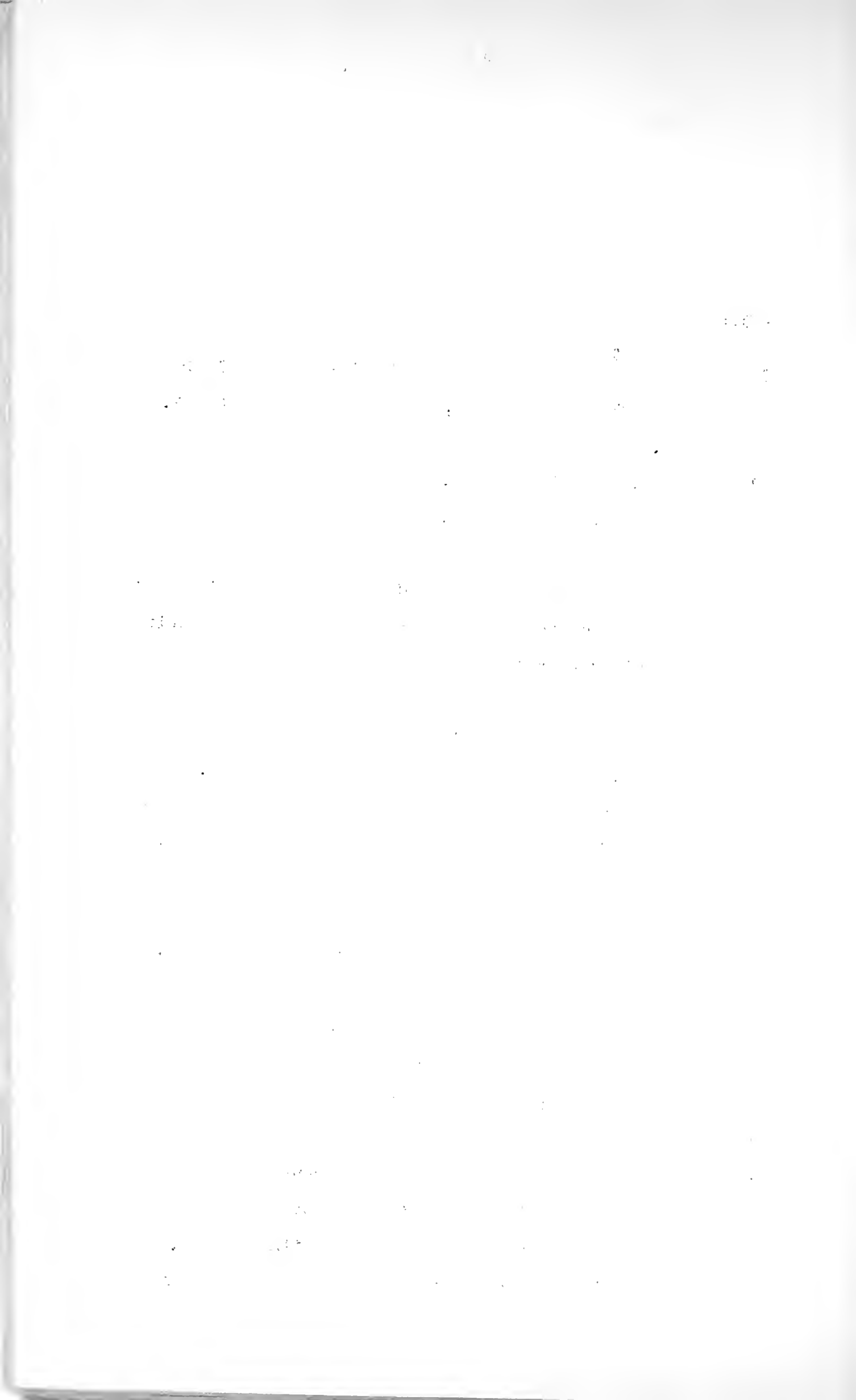
Plaintiff in Error.

)  
) ERROR TO CRIMINAL  
) COURT, COOK COUNTY.  
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JUDGE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendant was indicted on the charge of receiving stolen property of the total value of \$2110. He was tried and found guilty by a jury of the offense of receiving stolen property of the value of \$50 and his punishment fixed at 30 days imprisonment in the county jail and a fine of \$1000. Judgment was entered on the verdict. Defendant has appealed and assigns as his principal error the improper admission of evidence of subsequent offenses and the admission as exhibits of items of property other than those named in the indictment.

The law in this state, as settled by repeated decisions, is that in prosecutions for receiving stolen property it is competent for the purpose of showing guilty knowledge to prove that the accused had on other occasions prior to the offense charged received stolen property from the same thieves, and when such former transactions are proved, it is admissible to prove subsequent transactions between the same parties as tending to prove knowledge by showing a continuous practice of dealing with thieves. The foregoing is a statement of the law as set forth in



People v. Gotler, 311 Ill. 387, 390-1, which has been cited with approval in People v. Livermore, 390 Ill. 85 (1945) (involving a confidence game) and People v. Florito, 413 Ill. 123 (1952) (stolen property). In People v. Hobbs, 297 Ill. 399 (1921) the court held that subsequent acts of abortion are admissible to prove intent only where there is also evidence of prior acts of criminal abortion.

In the instant action there was no evidence of any dealings between the witnesses and defendant prior to the date set forth in the indictment. However, the state argues that defendant's counsel "opened the door" to evidence of subsequent transactions by eliciting testimony concerning such transactions on cross-examination. During the trial, the prosecution admitted, it would have been improper for it to offer evidence of subsequent transactions in the first instance. It is defendant's contention that he had the right to cross-examine witnesses for the purpose of discrediting them, and that was the only purpose for which the questions were asked. Did he thereby waive his right to object to testimony that these additional crimes were committed with his connivance, and could the additional items be admitted in evidence as exhibits of stolen property received by defendant?

The witness in question testified as an accomplice. When he testified, pursuant to questions asked him on cross-examination, that he had stolen other goods, defendant thereby "opened the door," permitting





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the state to question the witness as to whether or not these goods were stolen as part of the arrangement defendant had with the witness or in the course of the witness' dealings with defendant. If the state had confined itself to that extent, the evidence would have been proper. Instead, however, the state, in addition to eliciting this information from the witness, also produced and admitted in evidence the additional articles which the witness testified he had stolen. The items alleged in the indictment were two oxygen tents, two polio pack heaters, two wheel chairs, two beds, and two mattresses. The articles alleged to have been received at other times which were admitted in evidence as exhibits and remained as exhibits during the trial were two oxygen masks, four oxygen regulators, two humidifiers, female urinal and bedpan. These articles remained in court throughout the course of the trial and became as much a part of the case against defendant as if they had been named in the indictment. This was erroneous. In People v. Deal, 357 Ill. 634, 641 (1934) the court, citing People v. Allen, 321 Ill. 11, stated that even in those cases where evidence of other offenses is admissible, the prosecution is not permitted to go into detail with respect to them, obviously in order to avoid the conclusion on the part of the jury that the defendant was being tried not alone for the offense of stealing the property named in the indictment, but as well for the other offenses.

Complaint is also made of the court's conduct



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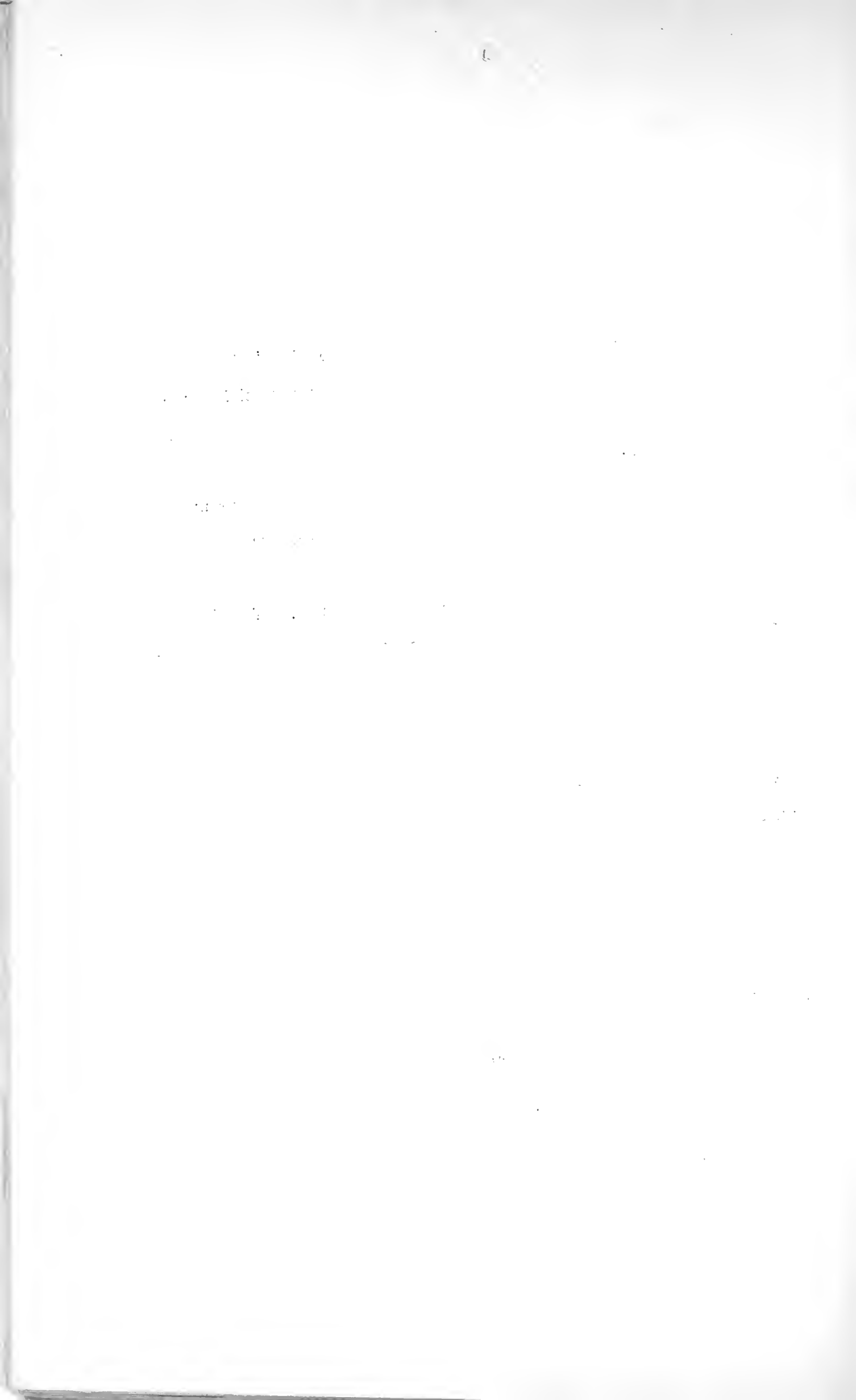
in comments before the jury with respect to the instructions in regard to the verdict. There is no basis for this complaint. The court tried the case patiently and fairly and made no statement not warranted during the conduct of the trial. It was unnecessary for counsel to make numerous motions to withdraw a juror. That creates confusion and induces error.

Complaint is made that the court in effect directed the jury to return a guilty verdict. No such construction can be placed on his statement to the jury. It is difficult, however, to see how the jury could reach a decision that defendant was guilty of receiving stolen property of the value of \$50. If guilty at all, he was guilty of receiving stolen property of the value of more than \$50.

We think the court ruled properly with respect to instructions. The judgment, however, must be reversed and the cause remanded for a new trial because of the error herein referred to.

Judgment reversed and cause  
remanded for new trial.

Robson, P. J., and McCormick, J., concur.













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